Federal Rule of Civil Procedure 1

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

Federal Rule of Civil Procedure 26(b)(2)(C)

- (2) Limitations on Frequency and Extent.
 - (A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.
 - (B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.
 - (C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
 - (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
 - (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
 - (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Federal Rule of Civil Procedure 26(g)

- (g) Signing Disclosures and Discovery Requests, Responses, and Objections.
 - (1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:
 - (A) with respect to a disclosure, it is complete and correct as of the time it is made; and
 - (B) with respect to a discovery request, response, or objection, it is:
 - (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
 - (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
 - (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.
 - (2) Failure to Sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.
 - (3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Federal Rule of Civil Procedure 30(b)(1)

(b) Notice of the Deposition; Other Formal Requirements.

(1) Notice in General. A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

Federal Rule of Civil Procedure 30(c)(1) & (2)

- (c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.
 - (1) Examination and Cross-Examination. The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.
 - (2) Objections. An objection at the time of the examination--whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition--must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

Federal Rule of Civil Procedure 30(d)(3)

- (d) Duration; Sanction; Motion to Terminate or Limit.
 - (1) Duration. Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.
 - (2) Sanction. The court may impose an appropriate sanction--including the reasonable expenses and attorney's fees incurred by any party--on a person who impedes, delays, or frustrates the fair examination of the deponent.
 - (3) Motion to Terminate or Limit.
 - (A) Grounds. At any time during a deposition, the deponent or a party may

move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

- (B) Order. The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.
- (C) Award of Expenses. Rule 37(a)(5) applies to the award of expenses.

Federal Rule of Civil Procedure 37(a)(1)

- (a) Motion for an Order Compelling Disclosure or Discovery.
 - (1) In General. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

Federal Rule of Civil Procedure 37(a)(3)

- (3) Specific Motions.
 - (A) To Compel Disclosure. If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.
 - (B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:
 - (i) a deponent fails to answer a question asked under Rule 30 or 31;
 - (ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);
 - (iii) a party fails to answer an interrogatory submitted under Rule 33;

- (iv) a party fails to respond that inspection will be permitted--or fails to permit inspection--as requested under Rule 34.
- (C) Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

Federal Rule of Civil Procedure 53

- (a) Appointment.
- (1) Scope. Unless a statute provides otherwise, a court may appoint a master only to:
 - (A) perform duties consented to by the parties;
 - (B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:
 - (i) some exceptional condition; or
 - (ii) the need to perform an accounting or resolve a difficult computation of damages; or
 - (C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.
 - (2) Disqualification. A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. § 455, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification.
 - (3) Possible Expense or Delay. In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.
- (b) Order Appointing a Master.
 - (1) Notice. Before appointing a master, the court must give the parties notice and

an opportunity to be heard. Any party may suggest candidates for appointment.

- (2) Contents. The appointing order must direct the master to proceed with all reasonable diligence and must state:
 - (A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);
 - (B) the circumstances, if any, in which the master may communicate ex parte with the court or a party;
 - (C) the nature of the materials to be preserved and filed as the record of the master's activities;
 - (D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and
 - (E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).
- (3) Issuing. The court may issue the order only after:
 - (A) the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455; and
 - (B) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.
- (4) Amending. The order may be amended at any time after notice to the parties and an opportunity to be heard.
- (c) Master's Authority.
 - (1) In General. Unless the appointing order directs otherwise, a master may:
 - (A) regulate all proceedings;
 - (B) take all appropriate measures to perform the assigned duties fairly and efficiently; and
 - (C) if conducting an evidentiary hearing, exercise the appointing court's

power to compel, take, and record evidence.

- (2) Sanctions. The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.
- (d) Master's Orders. A master who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.
- (e) Master's Reports. A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.
- (f) Action on the Master's Order, Report, or Recommendations.
 - (1) Opportunity for a Hearing; Action in General. In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.
 - (2) Time to Object or Move to Adopt or Modify. A party may file objections to--or a motion to adopt or modify--the master's order, report, or recommendations no later than 21 days after a copy is served, unless the court sets a different time.
 - (3) Reviewing Factual Findings. The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:
 - (A) the findings will be reviewed for clear error; or
 - (B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.
 - (4) Reviewing Legal Conclusions. The court must decide de novo all objections to conclusions of law made or recommended by a master.
 - (5) Reviewing Procedural Matters. Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.
- (g) Compensation.

- (1) Fixing Compensation. Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.
- (2) Payment. The compensation must be paid either:
 - (A) by a party or parties; or
 - (B) from a fund or subject matter of the action within the court's control.
- (3) Allocating Payment. The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.
- (h) Appointing a Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

Kan. Stat. Ann. § 60-230(c)(2)

- (c) Examination and cross-examination; record of the examination; objections; written questions.
 - (1) Examination and cross-examination. The examination and cross-examination of a deponent proceed as they would at trial under the provisions of K.S.A. 60-243, and amendments thereto. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under subsection (b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer. If requested by one of the parties, the testimony must be transcribed. The court may order the cost of transcription paid by one or some of, or apportioned among, the parties.
 - (2) Objections. An objection at the time of the examination, whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition or to any other aspect of the deposition, must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court or to present a motion under subsection (d)(3).

Kan. Stat. Ann. § 60-230(d)

- (d) Motion to terminate or limit.
 - (1) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses or oppresses the deponent or party. The motion may be filed in the court where the action is pending or where the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.
 - (2) Order. The court may order that the deposition be terminated or may limit its scope and manner as provided in subsection (c) of K.S.A. 60-226, and amendments thereto. If terminated, the deposition may be resumed only by order of the court where the action is pending.
 - (3) Award of expenses. The provisions of subsection (a) of K.S.A. 60-237, and amendments thereto, apply to the award of expenses.

Kan. Stat. Ann. § 60-237(a)(3)

- (3) Specific motions.
 - (A) To compel disclosure. If a party fails to make a disclosure required by subsection (b)(6) of K.S.A. 60-226, and amendments thereto, any other party may move to compel disclosure and for appropriate sanctions.
 - (B) To compel a discovery response. A party seeking discovery may move for an order compelling an answer, designation, production or inspection. This motion may be made if:
 - (i) A deponent fails to answer a question asked under K.S.A. 60-230 or 60-231, and amendments thereto;
 - (ii) a corporation or other entity fails to make a designation under subsection (b)(6) of K.S.A. 60-226 or subsection (a)(4) of K.S.A. 60-231, and amendments thereto;
 - (iii) a party fails to answer an interrogatory submitted under K.S.A. 60-233, and amendments thereto; or
 - (iv) a party fails to respond that inspection will be permitted, or fails to permit inspection, as requested under K.S.A. 60-234, and amendments thereto.
 - (C) Related to a deposition. When taking an oral deposition the party asking a question may complete or adjourn the examination before moving for an order.

Kansas Rules of Professional Responsibility 1.1

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Kansas Rules of Professional Responsibility 3.1

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Kansas Rules of Professional Responsibility 3.2

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Kansas Rules of Professional Responsibility 3.4

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Kansas Rules of Professional Responsibility 4.1

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by or made discretionary under Rule 1.6.

Kansas Rules of Professional Responsibility 8.4

It is professional misconduct for a lawyer to:

- (a) Violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

D. Kan. Rule 30.1

NOTICE OF DEPOSITIONS

The reasonable notice provided by Fed. R. Civ. P. 30(b)(1) for the taking of depositions is 7 days. For good cause, the court may enlarge or shorten such time. Fed. R. Civ. P. 6 governs the computation of time.

D. Kan. Rule 37.1

MOTIONS RELATING TO DISCOVERY

- (a) Content of Motions. Motions under Fed. R. Civ. P. 26(c) or 37(a) directed at depositions, interrogatories, requests for production or inspection, or requests for admissions under Fed. R. Civ. P. 30, 33, 34 or 36, or at the responses thereto, must be accompanied by copies of the notices of depositions, the portions of the interrogatories, requests, or responses in dispute. Motions under Fed. R. Civ. P. 45(c) directed at subpoenas must be accompanied by a copy of the subpoena in dispute.
- (b) Time for Filing Motions. Any motion to compel discovery in compliance with D. Kan. Rules 7.1 and 37.2 must be filed and served within 30 days of the default or service of the response, answer, or objection that is the subject of the motion, unless the court extends the time for filing such motion for good cause. Otherwise, the objection to the default, response, answer, or objection is waived.

D. Kan. Rule 37.2

DUTY TO CONFER CONCERNING DISCOVERY DISPUTES

The court will not entertain any motion to resolve a discovery dispute pursuant to Fed. R. Civ. P. 26 through 37, or a motion to quash or modify a subpoena pursuant to Fed. R. Civ. P. 45(c), unless the attorney for the moving party has conferred or has made reasonable effort to confer with opposing counsel concerning the matter in dispute prior to the filing of the motion. Every certification required by Fed. R. Civ. P. 26(c) and 37 and this rule related to the efforts of the parties to resolve discovery or disclosure disputes must describe with particularity the steps taken by all attorneys to resolve the issues in dispute.

A "reasonable effort to confer" means more than mailing or faxing a letter to the opposing party. It requires that the parties in good faith converse, confer, compare views, consult, and deliberate, or in good faith attempt to do so.

W.D. Mo. Rule 37.1(a)(2)

DISCOVERY MOTIONS

- (a) Except when authorized by an order of the Court, the Court will not entertain any discovery motions, until the following requirements have been satisfied:
 - 1. Counsel for the moving party has in good faith conferred or attempted to confer by telephone or in person with opposing counsel concerning the matter prior to the filing of the motion. Merely writing a demand letter is not sufficient. Counsel for the moving party shall certify compliance with this rule in any discovery motion. See Rule 26(c), Federal Rules of Civil Procedure and Crown Center Redevelopment Corp. v. Westinghouse Elec., 82 F.R.D. 108 (W.D. Mo. 1979); and
 - 2. If the issues remain unresolved after the attorneys have conferred in person or by telephone, counsel shall arrange with the Court for an immediate telephone conference with the judge and opposing counsel. No written discovery motion shall be filed until this telephone conference has been held.

DEPOSITION GUIDELINES

1. Cooperation.

Counsel are expected to cooperate with, and be courteous to, each other and deponents.

2. Stipulations.

Unless contrary to or inconsistent with the Federal Rules of Civil Procedure, Rules of Practice for the District of Kansas Rules or an order of the Court, the parties (and, when appropriate, a non-party witness) may stipulate in writing to alter, amend, or modify any practice relating to the noticing or taking of a deposition. Any stipulation extending the discovery deadline shall not operate to delay trial or any hearing or pretrial conference.

3. Scheduling.

Absent extraordinary circumstances, counsel shall consult in advance with opposing counsel and proposed deponents in an effort to schedule depositions at mutually convenient times and places. That counsel for a party may be unavailable shall not, however, be grounds for postponing a deposition if another attorney of record for that party is able to attend. Unless leave of court or agreement of counsel is first obtained, at least **five** (5) calendar days' notice of any deposition shall be given.

4. Attendance.

(a) Who may be present. Unless otherwise ordered under Fed. R. Civ. P. 26(c), depositions may be attended by counsel of record, members and employees of their firms, attorneys specially engaged by a party for purpose of the deposition, the parties or the representative of a party, and counsel for the deponent. While a deponent is being examined about any document designated as confidential pursuant to a protective or confidentiality agreement or order, any persons to whom disclosure is not authorized under the order or agreement shall be excluded from the deposition.

5. Conduct.

- **(a) Objections.** Objections shall be concise and shall not suggest answers to or otherwise coach the deponent. Argumentative interruptions will not be permitted. The only objections that should be asserted are those involving privilege or work product protection or some matter that may be remedied if presented at the time, such as an objection to the form of the question or the responsiveness of the answer. Other objections shall be avoided unless the deposition is being taken for the express purpose of preserving testimony.
- **(b) Directions not to answer.** Counsel shall not direct or request that a deponent not answer a question, unless (1) counsel has objected to the question on the ground that the answer is protected by privilege, work product immunity, or a limitation on evidence directed by the Court; or (2) the direction not to answer is necessary to allow a party or deponent to present a Fed. R. Civ. P. 30(d) motion to the

Court. When privilege or work product immunity is asserted, the witness is nevertheless required to answer questions relevant to the existence, extent, or waiver of the privilege/immunity, such as the date of a communication, who made it, to whom it has been disclosed, and its general subject matter.

(c) Private consultation. Private conferences between deponents and their attorneys during the actual taking of the deposition are improper except for the purpose of determining whether a privilege or work product immunity should be asserted. Unless prohibited by the Court for good cause shown, such conferences may be held during normal recesses and adjournments. Any private conference between a deponent and his/her attorney in violation of this guideline may be a proper subject for inquiry by deposing counsel to determine whether there has been any witness-coaching and, if so, what was discussed between the deponent and counsel. In such inquiry, the Court may determine whether, under applicable law, the parties to such a conferences have waived any attorney-client privilege.

6. Documents.

- (a) **Production of documents.** Party deponents shall have at least **thirty** (30) days before the scheduled deposition to produce any requested documents. Non-party witnesses subpoenaed to produce numerous documents shall be served at least **twenty** (20) calendar days before the deposition. Depending upon the quantity of documents to be produced, some time may be needed for inspection of the documents before the questioning begins.
- **(b) Protective or confidentiality order.** A copy of any protective or confidentiality order or agreement shall be provided to the deponent before the deposition begins if the deponent is to produce, or will be asked about, any documents that are subject to the order or agreement.
- (c) Review of documents. If the witness is going to be asked to review numerous or lengthy documents, copies of the documents should be sent to the witness sufficiently in advance of the deposition to enable the witness to read them prior to the deposition. If the documents are not provided in advance or if the witness does read them thus prolonging the deposition the court can consider that a reason for extending the time limit on the deposition.

7. Depositions of Witnesses Who Have No Knowledge of the Facts.

An officer, director, or managing agent of a corporation or a governmental official served with a notice of a deposition or subpoena regarding a matter about which such person has no knowledge may submit to the noticing party five (5) days before the deposition an affidavit so stating and identifying a person within the corporation or governmental entity believed to have such knowledge. Notwithstanding such an affidavit, the noticing party may proceed with the deposition, subject to the right of the witness to seek a protective order.

8. Videotaped depositions.

By indicating in its notice of a deposition that it will record the deposition by videotape a party shall be entitled to videotape the deposition, unless a motion for protective order is filed within the time limits provided by D.Kan. Rule 26.2. Videotape depositions shall be subject to the following terms and conditions:

- (a) **Stenographic recording.** The videotaped deposition shall be simultaneously recorded stenographically by a qualified court reporter. The court reporter shall administer the oath or affirmation to the deponents on camera. The written transcript by the court reporter shall constitute the official record of the deposition for purposes of Fed. R. Civ. P. 30(e) (submission to witness) and 30(f) (filing, exhibits).
- **(b) Cost.** The noticing party shall bear the expense of both the videotaping and the stenographic recording. Any party may at its own expense obtain a copy of the videotape, in addition to the stenographic transcript. Requests for taxation of these costs may be made at the conclusion of the litigation in accordance with applicable law.
- (c) Video Operator. The operator of the videotape recording equipment shall be subject to the provisions of Fed. R. Civ. P. 28(c). At the beginning of the deposition the operator shall swear or affirm to record the proceedings fairly and accurately.
- (d) Attendance. Each witness, attorney, and other person attending the deposition shall be identified on camera at the beginning of the deposition. Thereafter, only the deponent (and any demonstrative materials used during the deposition) shall be videotaped.
- (e) Standards. The deposition shall be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at a trial. Unless physical restrictions dictate otherwise, the deponent shall be seated at a table or in a witness box except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition shall be conducted in a neutral setting, against a solid background, with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting, and field of view shall be changed only as necessary to accurately record the natural body movements of the deponent or to portray exhibits and materials used during the deposition. Sound levels shall be altered only as necessary to satisfactorily record the voices of counsel and the deponent.
- (f) Interruptions. The videotape shall run continuously throughout the active conduct of the deposition. Videotape recording shall be suspended during all "off the record" discussions.
- **(g) Re-reading.** The re-reading of questions or answers, when needed, shall be done on camera by the stenographic court reporter.
- **(h) Index.** The videotape operator shall use a counter on the recording equipment. After completion of the deposition, the operator shall prepare a log, cross-referenced to counter numbers, which

identifies the positions on the tape where examination by different counsel begins and ends, where objections are made and examination resumes, where exhibits are identified, and where any interruption of continuous tape-recording occurs, whether for recesses, "off the record" discussions, mechanical failure or otherwise.

- (i) **Preservation.** The party initiating the videotape procedure shall preserve custody of the original videotape in its original condition together with the operator's log index and a certificate of the operator attesting to the accuracy of the tape until further order of the Court.
- **(j) Objections.** Requests for pretrial rulings on the admissibility of evidence obtained during a videotaped deposition shall be accompanied by appropriate pages of the written transcript. If the objection involves matters peculiar to the videotaping, a copy of the videotape shall also be provided to the Court.
- (k) Use at trial; editing of tapes. A party desiring to offer a videotape deposition at trial shall be responsible for having available at trial the appropriate playback equipment and a trained operator. After the parties have designated the portions of a videotape to be used at trial, an edited copy of the tape that has been purged of any unnecessary portions and any portions to which objections have been sustained, shall be prepared by the offering party to facilitate continuous playback. A copy of the edited tape shall be made available to other parties at least ten (10) days before it is used. The unedited original of the tape shall also be available at the trial.

9. Immediate presentation for ruling on dispute.

Disputes that arise during the deposition which cannot be resolved by agreement and which, if not immediately resolved, will significantly disrupt the discovery schedule or require a rescheduling of the deposition, may be addressed by oral motion in a telephone conference with the Court, subject to the Court's availability. The court reporter recording the deposition shall record as part of the deposition the presentation of the issue to the Court and the Court's ruling.



CODE OF PRETRIAL AND TRIAL CONDUCT



Please accept this copy of the Code of Pretrial and Trial Conduct published by the American College of Trial Lawyers. The development of this Code by the Fellows of the College and its distribution to persons and institutions engaged in all aspects of the administration of justice represents an important part of the execution of the College's mandate to improve and elevate standards of trial practice, the administration of justice and the ethics of the profession.

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice.

The College is confident that utilization of this Code in the course of legal proceedings in the courts and as a teaching aid at the Bar and in the nation's law schools will represent a positive contribution to improving and elevating standards of trial practice, the administration of justice and the ethics of the profession.

Message from the Chief Justice of the United States

For more than fifty years, the American College of Trial Lawyers has promoted professionalism in the conduct of trial litigation. Its authoritative Code of Trial Conduct, first published in 1956, has served as an enduring landmark in the development of professional standards for advocates.

The College continues those efforts through the publication of its revised and enlarged Code of Pretrial and Trial Conduct. This comprehensive resource sets out aspirational principles to guide litigators in all aspects of their work as advocates of client interests. The Code looks beyond the minimum ethical requirements that every lawyer must follow and instead identifies those practices that elevate the profession and contribute to fairness in the administration of justice.

As Justice Frankfurter noted, "An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense." I encourage lawyers who engage in trial work to observe and advance the principles that the College has set forth in this volume.

I commend the American College of Trial Lawyers for its leadership in defining and refining the standards of professionalism that are vital to our system of justice.

John G. Roberts, Jr. Chief Justice of the United States

Just What J.

" hold every man a debtor to his profession; from the which, as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves, by way of amends, to be a help and ornament thereto."

« Sir Francis Bacon »

American College of Trial Lawyers



CODE OF PRETRIAL AND TRIAL CONDUCT

Approved by the Board of Regents, June 2009

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Forward

he Legal Ethics and Professionalism Committee of the American College of Trial Lawyers (the "College") is charged with the following mandate:

To advance, improve, and promote ethical standards and professionalism in the trial bar in all its aspects in both the United States and Canada as well as to engage in such other activities as may be directed by the Board of Regents.

All jurisdictions have codes of conduct that prescribe minimum standards for disciplinary purposes. There is no need here to duplicate such standards. This ACTL Code represents an attempt by the College to set down aspirational, rather than minimal, guidelines for trial lawyers and judges. The problem in trial practice today is not that lawyers violate the ethical rules, although some lawyers do. Most lawyers know the rules and try to comply. The real problem is the gradual corrosion of the profession's traditional aspirations, which are:

- Honor for values such as honesty, respect and courtesy toward litigants, opposing advocates and the court;
- A distaste for meanness, sharp practice, and unnecessarily aggressive behavior;
- Engagement in public service;
- A focus on the efficient, fair preparation and trial of cases; and
- A role as agent for counseling and for the resolution of disputes.

Despite what the profession says, the profession often acts as if these values are inconsistent with effective advocacy in an adversary system of justice. The College is uniquely positioned to lead the way in changing these attitudes because it strives to offer Fellowship only to those lawyers who embody the skill and values to which they and the profession should aspire. The College cannot lead by focusing on the lowest floor of acceptable behavior.

The College sees the new code as one that can be endorsed by courts, that can be profitably used in training programs by law schools and bar organizations, and that describes the values that the Fellows of the American College of Trial Lawyers endorse and practice daily.

The new Code of Pretrial and Trial Conduct is a product that the College believes can be endorsed by courts and the profession as articulating the level of conduct to which all members of our profession should aspire. If trial lawyers practice these principles the profession will begin a process of change that benefits lawyers, litigants, and our system of justice.

Preamble

dmission to the Bar is a high honor, and those lawyers who devote their lives to presenting cases in the courts are truly privileged. Trial lawyers are officers of the court. They are entrusted with a central role in the administration of justice in our society necessary to democracy. Lawyers who engage in trial work have a special responsibility to strive for prompt, efficient, ethical, fair and just disposition of litigation. The American College of Trial Lawyers believes that, as officers of the court, trial lawyers must conduct themselves in a manner that reflects the dignity, fairness, and seriousness of purpose of the system of justice they serve. They must be role models of skill, honesty, respect, courtesy, and fairness consistent with their obligations to the client and the court.

Trial lawyers have a duty to conduct themselves so as to preserve the right to a fair trial, one of the most basic of all constitutional guarantees, while courageously, vigorously and diligently representing their clients and applying the relevant legal principles to the facts as found. Without courtesy, fairness, candor, and order in the pretrial process and in the courtroom, reason cannot prevail and constitutional rights to justice, liberty, freedom and equality under law will be jeopardized. The dignity, decorum and courtesy that have traditionally characterized the courts are not empty formalities. They are essential to an atmosphere in which justice can be done.

No client, corporate or individual, however powerful, nor any cause, civil, criminal or political, however important, is entitled to receive, nor should any lawyer render, any service or advice encouraging or inviting disrespect of the law or of the judicial office. No lawyer may sanction or invite corruption of any person exercising a public office or private trust. No lawyer may condone in any way deception or betrayal of the court, fellow members of the Bar, or the public. A lawyer advances the honor of the profession and the best interests of the client when a lawyer embodies and encourages an honest and proper respect for the law, its institutions and officers. Above all, a lawyer finds the highest honor in a deserved reputation as an officer for justice, faithful to private trust and to public duty, and as an honest person.

This Code of Pretrial and Trial Conduct ("the Code") is not intended to supplant any local rules, procedural rules, or rules of professional conduct. This Code aims to provide aspirational guidance for trial lawyers. It sets forth a standard above the ethical minimum – a standard of conduct worthy of the privileges and responsibilities conferred on those who have sworn to serve our system of justice.

This Code is intended to provide guidance for a lawyer's professional conduct except insofar as the applicable law, code or rules of professional conduct in a particular jurisdiction require otherwise. It is an aspirational guide for trial lawyers and should not give rise to a cause of action or sanction, create a presumption that a legal duty has been breached or form the basis for disciplinary proceedings not created under the applicable law, court rules or rules of professional conduct.

CODE OF PRETRIAL AND TRIAL CONDUCT

Qualities of a Trial Lawyer

Trial lawyers are officers of the court. They are entrusted with a central role in the administration of justice in our society. Lawyers who engage in trial work have a special responsibility to strive for prompt, efficient, ethical, fair and just disposition of litigation.

Honesty, Competence and Diligence

- (a) A lawyer must in all professional conduct be honest, candid and fair.
- (b) A lawyer must possess and apply the legal knowledge, skill, thoroughness and preparation necessary for excellent representation.
- (c) A lawyer must diligently, punctually and efficiently discharge the duties required by the representation in a manner consistent with the legitimate interests of the client.

Obligations to Clients

A lawyer must provide a client undivided allegiance, good counsel and candor; the utmost application of the lawyer's learning, skill and industry; and the employment of all appropriate means within the law to protect and enforce legitimate interests of a client. A lawyer may never be influenced directly or indirectly by any consideration of self-interest. A lawyer has an obligation to undertake unpopular causes if necessary to ensure justice. A lawyer must maintain an appropriate professional distance in advising his or her client, in order to provide the greatest wisdom.

Employment and Withdrawal

- (a) It is the right of a lawyer to accept employment in any civil case unless such employment is or would likely result in a violation of the rules of professional responsibility, a rule of court or applicable law. It is the lawyer's right and duty to take all proper actions and steps to preserve and protect the legal merits of the client's position and claims, and the lawyer should not decline employment in a case on the basis of the unpopularity of the client's cause or position.
- (b) The right of a person accused of a crime to be represented by competent counsel is essential to our system of justice. A lawyer should not decline such representation because of the lawyer's personal or the community's opinion of the guilt of the accused or heinousness of the crime. A lawyer must raise all defenses and arguments that should be asserted on the client's behalf.

Fidelity to the Client's Interests

A lawyer must not permit considerations of personal or organizational advancement, financial gain, favor with other persons, or other improper considerations to influence the representation of the client.

Obligations to Colleagues

A lawyer should be straightforward and courteous with colleagues. A lawyer should be cooperative with other counsel while zealously representing the client. A lawyer must be scrupulous in observing agreements with other lawyers.

Relations with Other Counsel

- (a) A lawyer must be courteous and honest when dealing with opposing counsel.
- (b) A lawyer should not make disparaging personal remarks or display acrimony toward opposing counsel, and must avoid demeaning or humiliating words in written and oral communication with adversaries.
- (c) When practicable and consistent with the client's legitimate interests and local custom, lawyers should agree to reasonable requests to waive procedural formalities.
- (d) The lawyer, and not the client, has the discretion to determine the customary accommodations to be granted opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights.
- (e) A lawyer must adhere strictly to all written or oral promises to and agreements with opposing counsel, and should adhere in good faith to all agreements implied by the circumstances or by appropriate local custom.
- (f) Written communications with opposing counsel may record and confirm agreements and understandings, but must not be written to ascribe to any person a position that he or she has not taken or to create a record of events that have not occurred.

Obligations to the Court

Judges and lawyers each have obligations to the court they serve. A lawyer must be respectful, diligent, candid and punctual in all dealings with the judiciary. A lawyer has a duty to promote the dignity and independence of the judiciary, and protect it against unjust and improper criticism and attack. A judge has a corresponding obligation to respect the dignity and independence of the lawyer, who is also an officer of the court.

Communication with the Court

- (a) A lawyer must always show courtesy to and respect for a presiding judge. While a lawyer may be cordial in communicating with a presiding judge in court or in chambers, the lawyer should never exhibit inappropriate familiarity. In social relations with members of the judiciary, a lawyer should take care to avoid any impropriety or appearance of impropriety. In making any communication about a judge, a lawyer should not express or imply that the lawyer has a special relationship or influence with the judge.
- (b) A lawyer should never make any attempt to obtain an advantage through improper ex parte communication with a judge or the staff in the judge's chambers. A lawyer must make every effort to avoid such communication on any substantive matter and any matter that could reasonably

be perceived as substantive, except as addressed in subpart (c) below. When a lawyer informally communicates with a court, the highest degree of professionalism is required.

- (c) If ex parte communication with the court is permitted by applicable rules of ethics and procedure, a lawyer must diligently attempt to notify opposing parties, through their counsel if known, unless genuine circumstances exist that would likely prejudice the client's rights if notice were given. When giving such notice, the lawyer should advise the opponent of the basis for seeking immediate relief and should make reasonable efforts to accommodate the opponent's schedule so that the party affected may be represented.
- (d) When possible, a lawyer's communications with the court related to a pending case should be in writing, and copies should be provided promptly to opposing counsel. When circumstances require oral communication with the court, a lawyer must notify opposing counsel of all such communications promptly.

Independence and Impartiality of Judicial Officers and Neutrals

- (a) Judges, arbitrators, mediators and other neutrals must maintain their independence and impartiality. They must not allow professional or personal relationships, employment prospects or other improper considerations to influence or appear to influence the discharge of their duties.
- (b) A judge must promote the dignity and proper discharge of the duties of the lawyer, who is also an officer of the court entitled to respect and courtesy.

Obligations to the System Of Justice

A lawyer has an obligation to promote the resolution of cases with fairness, efficiency, courtesy, and justice. As an officer of the court and as an advocate in the court, a lawyer should strive to improve the system of justice and to maintain and to develop in others the highest standards of professional behavior.

Devotion to the System of Public Justice

A lawyer must strive at all times to uphold the honor and dignity of the profession. Every lawyer should contribute to the improvement of the system of justice and support those measures that enhance the efficiency, fairness and quality of justice dispensed by the courts. A lawyer should never manifest, or act upon, bias or prejudice toward any person based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.

Pro Bono Publico

A lawyer should personally render public interest legal service and support organizations that provide legal services to persons of limited means by contributing time and resources.

Settlement and Alternative Dispute Resolution

A lawyer must never be reluctant to take a meritorious case to trial if the dispute cannot otherwise be satisfactorily resolved. However, a lawyer must provide the client with alternatives to trial when to do so would be consistent with the client's best interests. A lawyer should educate clients early in the legal process about various methods of resolving disputes without trial, including mediation, arbitration, and neutral case evaluation.

Motions and Pretrial Procedure

A lawyer has an obligation to cooperate with opposing counsel as a colleague in the preparation of the case for trial. Zealous representation of the client is not inconsistent with a collegial relationship with opposing counsel in service to the court. Motions and pretrial practice are often sources of friction among lawyers, which contributes to unnecessary cost and lack of collegiality in litigation. The absence of respect, cooperation, and collegiality displayed by one lawyer toward another too often breeds more of the same in a downward spiral. Lawyers have an obligation to avoid such conduct and to promote a respectful, collegial relationship with opposing counsel.

Scheduling and Granting Extensions for Pretrial Events

- (a) A lawyer should schedule pretrial events cooperatively with other counsel as soon as the event can reasonably be anticipated. Lawyers scheduling an event should respect the legitimate obligations of colleagues and avoid disputes about the timing, location and manner of conducting the event
- (b) A lawyer should seek to reschedule an event only if there is a legitimate reason for doing so and not for improper tactical reasons. A lawyer receiving a reasonable request to reschedule an event should make a sincere effort to accommodate the request unless the client's legitimate interests would be adversely affected.
- (c) Scheduling pretrial events and granting requests for extensions of time are properly within the discretion of the lawyer unless the client's interests would be adversely affected. A lawyer should counsel the client that cooperation among lawyers on scheduling is an important part of the pretrial process and expected by the court. A lawyer should not use the client's decision on scheduling as justification for the lawyer's position unless the client's legitimate interests are affected.

Service of Process, Pleadings and Proposed Orders

- (a) The timing, manner, and place of filing, electronic filing or serving papers should never be calculated to delay, embarrass or improperly disadvantage the party being served.
- (b) Unless exigent circumstances require otherwise, papers filed in a court must be promptly served upon or made available to opposing parties or counsel.
- (c) Papers should not be served in a manner deliberately designed to unfairly shorten an opponent's time for response or to take other unfair advantage of an opponent.
- (d) Service must be made in a manner that affords an opposing party a fair and timely opportunity to respond, unless exigent circumstances legitimately require or applicable rules permit an exparte application to the court or an abbreviated time for response.

Motion Practice and Other Written Submissions to the Court

(a) Before filing pretrial motions, lawyers should work together to resolve issues and to

identify matters not in dispute. When motions are necessary, lawyers should cooperate to facilitate the filing, service, and hearing of the motion. Orders submitted to the court must fairly and accurately reflect the requested or actual ruling of the court.

- (b) In written submissions and oral presentations, a lawyer should neither engage in ridicule nor sarcasm. Neither should a lawyer ever disparage the integrity, intelligence, morals, ethics, or personal behavior of an opposing party or counsel unless such matters are directly relevant under controlling law.
- (c) When documents or data are presented to the court, they must be furnished to opposing counsel in exactly the same format, including identical highlighting or other emphasis.

Pretrial Conferences

- (a) A lawyer should seek to reach agreement with opposing counsel to limit the issues to be addressed before and during trial.
- (b) A lawyer should determine in advance of a pretrial conference the trial judge's custom and practices in conducting such conferences.
- (c) A lawyer should satisfy all directives of the court set forth in the order setting a pretrial conference and should consult and comply with all local rules and with any specific requirements of the trial judge unless properly challenged when based upon a belief of unfair prejudice to the client.
- (d) Before a pretrial conference, a lawyer should ascertain the willingness of the client (and the carrier if an insurer is involved) to participate in alternative dispute resolution.
- (e) Unless unavoidable circumstances prevent it, a lawyer representing a party at a pretrial conference must be thoroughly familiar with each aspect of the case, including the pleadings, the evidence, and all potential procedural and evidentiary issues.
- (f) A lawyer should alert the court as soon as practicable to scheduling conflicts of clients, experts, and witnesses.
- (g) If stipulations are possible for uncontested matters, a lawyer should propose specific stipulations and work with opposing counsel to obtain an agreement in advance of the pretrial conference.
- (h) In advance of a final pretrial conference, discovery should be completed, discovery responses should be supplemented, evidentiary depositions should be concluded, and settlement should be explored.
- (i) Unless unavoidable circumstances prevent it, the final pretrial conference should be attended by a lawyer who will actually try the case, and, in any event, by a lawyer who is familiar with the case.
- (j) At or before a final pretrial conference, a lawyer should alert the court to the need for any pretrial rulings, hearings on motions or other matters requiring action by the court in advance of trial.
- (k) At the final pretrial conference, a lawyer should be prepared to advise the court of the status of settlement negotiations and the likelihood of settlement before trial.

Discovery

A lawyer must conduct discovery as a focused, efficient, and principled procedure to gather and preserve evidence in the pursuit of justice. Discourtesy, obfuscation, and gamesmanship have no proper place in this process.

Discovery Practice

- (a) In discovery, as in all other professional matters, a lawyer's conduct must be honest, courteous, and fair.
- (1) A lawyer should conduct discovery efficiently to elicit relevant facts and evidence and not for an improper purpose, such as to harass, intimidate, unduly burden another party or a witness or to introduce unnecessary delay. Overly broad document requests should be avoided by focusing on clear materiality and a sense of cost/benefit.
- (2) A lawyer should respond to written discovery in a reasonable manner and should not interpret requests in a strained or unduly restrictive way in an effort to avoid responding or to conceal relevant, nonprivileged information.
- (3) Objections to interrogatories, requests for production, and requests for admissions must be made in good faith and must be adequately explained and limited in a manner that fairly apprises the adversary of the material in dispute and the bona fide grounds on which it is being withheld.
- (4) When a discovery dispute arises, opposing lawyers must attempt to resolve the dispute by working cooperatively together. Lawyers should refrain from filing motions to compel or for court intervention unless they have genuinely tried, but failed, to resolve the dispute through all reasonable avenues of compromise and resolution.
- (5) Lawyers should claim a privilege only in appropriate circumstances. They must not assert a privilege in an effort to withhold or to suppress unprivileged information or to limit or delay a response.
- (6) Requests for additional time to respond to discovery should be made as far in advance of the due date as reasonably possible and should not be used for tactical or strategic reasons.
- (7) Unless there are compelling reasons to deny a request for additional time to respond to discovery, an opposing lawyer should grant the request without necessitating court intervention. Compelling reasons to deny such a request exist only if the client's legitimate interests would be materially prejudiced by the proposed delay.
- (b) Depositions should be dignified, respectful proceedings for the discovery and preservation of evidence.
- (1) A lawyer should limit depositions to those that are necessary to develop the claims or defenses in the pending case or to perpetuate relevant testimony.
 - (2) A lawyer should conduct a deposition with courtesy and decorum and must

never verbally abuse or harass the witness, engage in extended or discourteous colloquies with opposing counsel or unnecessarily prolong the deposition.

(3) During a deposition, a lawyer must assert an objection only for a legitimate purpose. Objections must never be used to obstruct questioning, to communicate improperly with the witness, to intimidate, to harass the questioner or to disrupt the search for facts or evidence germane to the case.

Relationships with Witnesses and Litigants

A lawyer must treat all persons involved in a case with candor, courtesy and respect for their role and rights in the legal process.

Communicating with Nonparty Fact Witnesses

- (a) A lawyer must carefully comply with all laws and rules of professional responsibility governing communications with persons and organizations with whom the lawyer does not have an attorney-client relationship. A lawyer must be especially circumspect in communications with nonparty fact witnesses who have a relationship to another party.
 - (b) In dealing with a nonparty who is a fact witness or a potential fact witness, a lawyer must:
- (1) disclose the lawyer's interest or role in the pending matter and avoid misleading the witness about the lawyer's purpose or interest in the communication;
 - (2) be truthful about the material facts and the applicable law;
- if the nonparty has no counsel, correct any misunderstanding expressed by the nonparty;
 - (4) treat the nonparty courteously; and
 - (5) avoid unnecessarily embarrassing, inconveniencing or burdening the nonparty.
- (c) If a lawyer is informed that a nonparty fact witness is represented by counsel in the pending matter, the lawyer must not communicate with the witness concerning the pending litigation without permission from that counsel.
- (d) If communicating with a nonparty fact witness, the lawyer should be careful to avoid fostering any impression that the lawyer also represents that witness unless the lawyer does, in fact, represent the witness in compliance with the applicable rules of professional responsibility.
- (e) A lawyer should not obstruct another party's access to a nonparty fact witness or induce a nonparty fact witness to evade or ignore process.
- (f) A lawyer should not issue a subpoena to a nonparty fact witness except to compel, for a proper purpose, the witness's appearance at a deposition, hearing, or trial or to obtain necessary documents in the witness's possession.

Access to Fact Witnesses and Evidence

- (a) Subject to the applicable law and ethical principles, and to constitutional requirements in criminal matters, a lawyer may properly interview any person who is not a retained expert, because a fact witness does not "belong" to any party. A lawyer should avoid any suggestion calculated to induce any witness to suppress evidence or to deviate from the truth. However, without counseling the witness to refrain from cooperating with opposing counsel, a lawyer may advise any witness that he or she does not have a legal duty to submit to an interview or to answer questions propounded by opposing counsel, unless required to do so by judicial or legal process.
- (b) A lawyer may never suppress any evidence that the lawyer or the client has a legal obligation to reveal or to produce. In the absence of such an obligation, however, it is not a lawyer's duty to disclose any work product, evidence or the identity of any witness.
- (c) A lawyer must not advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of becoming unavailable as a witness.
- (d) Except as provided in subparagraphs (1) and (2) below, a lawyer should not pay, offer to pay or acquiesce in the payment of compensation to a fact witness and may never offer or give any witness anything of value contingent upon the content of the witnesses' testimony or the outcome of the case. To the extent permitted by the applicable rules of professional responsibility, a lawyer may advance, guarantee or acquiesce in the payment of:
 - (1) expenses reasonably incurred by a witness in attending or testifying; and
- (2) reasonable compensation to a witness for the witness's loss of time in attending or testifying;
- (e) A lawyer may solicit witnesses to a particular event or transaction but not to testify to a particular version of the facts.

Relations with Consultants and Expert Witnesses

- (a) In retaining an expert witness, a lawyer should respect the integrity, professional practices and procedures in the expert's field and must never ask or encourage the expert to compromise the integrity of those practices and procedures for purposes of the particular matter for which the expert has been retained.
- (b) A retained expert should be fairly and promptly compensated for all work on behalf of the client. A lawyer must never make compensation contingent in any way upon the substance of the expert's opinions or written report or upon the outcome of the matter for which the expert has been retained.
- c) Other than as expressly permitted by governing law, a lawyer should not communicate with, or seek to communicate with, an expert witness concerning the pending litigation whom the lawyer knows to have been retained by another party, unless express permission is granted by counsel for the retaining party.

Trial

A lawyer must conduct himself or herself in trial so as to promote respect for the court and preserve the right to a fair trial. A lawyer should avoid any conduct that would undermine the fairness and impartiality of the administration of justice, and seek to preserve the dignity, decorum, justness and courtesy of the trial process.

Relations with Jurors

Lawyers and judges should be respectful of the privacy of jurors during voir dire and after a verdict. A lawyer should abstain from all acts, comments and attitudes calculated to inappropriately curry favor with any juror, such as fawning, flattery, solicitude for the juror's comfort or convenience or the like.

Courtroom Decorum

- (a) Proper decorum in the courtroom is not an empty formality. It is indispensable to the pursuit of justice at trial.
- (b) In court, a lawyer should always display a courteous, dignified and respectful attitude toward the judge presiding and should promote respect for and confidence in the judicial office. The judge should be courteous and respectful to the lawyer, who is also an officer of the court.
- (c) A lawyer should never engage in discourteous or acrimonious comments or exchanges with opposing counsel. Objections, requests and observations must be addressed to the court.
- (d) A lawyer should advise the client and witnesses appearing in the courtroom of the kind of behavior expected and counsel them against engaging in any disrespectful, discourteous or disruptive behavior in the courtroom.

Trial Conduct

- (a) A lawyer has the professional obligation to represent every client courageously, vigorously, diligently and with all the skill and knowledge the lawyer possesses. The conduct of a lawyer before the court and with other lawyers should at all times be characterized by civility. A lawyer should present all proper arguments against rulings the lawyer deems erroneous or prejudicial and ensure that a complete and accurate case record is made. In doing so, the lawyer should not be deterred by any fear of judicial displeasure.
 - (b) In appearing in a professional capacity before a tribunal, a lawyer must not:
- (1) improperly obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value; nor should a lawyer counsel, permit or assist another person to do any such act;
- (2) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law; or
- (3) allude to any matter that the lawyer does not reasonably believe is relevant or will not be supported by admissible evidence, assert personal knowledge of facts in issue except when

testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

- (c) A lawyer should not interrupt or interfere with an examination or argument by opposing counsel, except to present a proper objection to the court.
- (d) When a court has made an evidentiary ruling, a lawyer should not improperly circumvent that ruling, although a lawyer may seek to make a record of the excluded evidence or a review of the ruling.
- (e) A lawyer must not attempt to introduce evidence or to make any argument that the lawyer knows is improper. If a lawyer has doubt about the propriety or prejudicial effect of any disclosure to the jury, the lawyer should request a ruling out of the jury's hearing.
- (f) A lawyer should never engage in acrimonious conversations or exchanges with opposing counsel in the presence of the judge or jury.
- (g) Examination of jurors and of witnesses should be conducted from a suitable distance, except when handling evidence or circumstances otherwise require.
- (h) Unless local custom dictates otherwise, a lawyer should rise when addressing or being addressed by the judge, except when making brief objections or incidental comments. A lawyer should be attired in a proper and dignified manner in the courtroom.
- (i) A lawyer should not in argument assert as a fact any matter that is not supported by evidence.
- (j) A lawyer must never knowingly misquote or mischaracterize the contents of documentary evidence, the testimony of a witness, the statements or argument of opposing counsel, or the language of a judicial decision.
- (k) A lawyer should not propose a stipulation in the jury's presence unless the lawyer knows or has reason to believe the opposing lawyer will accept it.
- (l) A lawyer who receives information clearly establishing that the client has, during the representation, perpetrated a fraud on the court should immediately take the actions required by the appropriate procedural and ethical rules.

Public Statements about Pending Litigation

A case should be tried in the courtroom and not in the media. A lawyer should follow all rules and orders of the court concerning publicity. In the absence of a specific rule or order, a lawyer should not make any extrajudicial statement that may prejudice an adjudicative proceeding.

Tenets of Professional Courtesy - Kansas City Metropolitan Bar Association

In order to promote a high level of professional courtesy and improve the professional relationship among members of the Kansas City Metropolitan Bar Association, the association adopts the following Tenets of Professional Courtesy.

- I. A Lawyer Should Never Knowingly Deceive Another Lawyer.
- II. A Lawyer Should Honor Promises or Commitments Made to Another Lawyer.
- III. A Lawyer Should Make All Reasonable Efforts to Schedule Matters with Opposing Counsel by Agreement.
- IV. A Lawyer Should Maintain a Cordial and Respectful Relationship with Opposing Counsel.
- V. A Lawyer Should Seek Sanctions Against Opposing Counsel Only Where Required for the Protection of the Client and not for Mere Tactical Advantage.
- VI. A Lawyer Should Not Make Unfounded Accusations of Unethical Conduct About Opposing Counsel.
- VII. A Lawyer Should Never Intentionally Embarrass Another Lawyer and Should Avoid Personal Criticism of Another Lawyer.
- VIII. A Lawyer Should Always Be Punctual.
- IX. A Lawyer Should Seek Informal Agreement on Procedural and Preliminary Matters.

40.29 Deposition Guidelines

It is ORDERED¹ that depositions be conducted in accordance with the following rules:

- 1. *Cooperation.* Counsel are expected to cooperate with, and be courteous to, each other and deponents.
- 2. Stipulations. Unless contrary to an order of the court, the parties (and when appropriate, a nonparty witness) may stipulate in any suitable writing to alter, amend, or modify any practice relating to noticing, conducting, or filing a deposition. Stipulations for the extension of discovery cutoffs set by the court are not valid, however, until approved by the court.
- 3. Scheduling. All depositions in this litigation may be cross-noticed in any related action pending in state court. Liaison counsel representing the side initiating a deposition shall provide to all known state liaison counsel at least ____ days notice of all depositions filed by plaintiffs and defendants, respectively. Absent extraordinary circumstances, counsel shall consult in advance with opposing counsel and unrepresented-proposed deponents in an effort to schedule depositions at mutually convenient times and places. [That some counsel may be unavailable shall not, however, in view of the number of attorneys involved in this litigation, be grounds for deferring or postponing a deposition if another attorney from the same firm or who represents a party with similar interests is able to attend.]

Scheduling should take into account (a) the availability of documents from among those produced by the parties and third parties, (b) the objective of avoiding the need to subject any person to repeated depositions, and (c) the need to preserve relevant testimony. As a general rule, no witness should be deposed on the same subject more than once in this litigation. A party seeking to take a second deposition of a witness shall provide the opposing party its basis for an exception and a listing of the subjects for which it seeks to depose the witness. Second depositions on new subject matter shall be permitted only upon consent of the parties or an order of this Court issued for good cause shown.

4. *Location*. The location of depositions should be as consistent as possible within each city so that any videotape, videoconferencing, or other equipment can be left in place.

Attendance

(a) Who May Be Present. Unless otherwise ordered under Fed. R. Civ. P. 26(c), depositions may be attended by counsel of record, members and employees of their firms, attorneys specially engaged by a party for purposes of the deposition, the parties or the representative of a party, counsel for the deponent, and potential witnesses. While a deponent is being examined about any stamped confidential document or the confidential information contained therein, persons to whom disclosure is not authorized under the Confidentiality Order shall be excluded.

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(b) Unnecessary Attendance. Unnecessary attendance by counsel is discouraged and may not be compensated in any fee application to the court. Counsel who have only marginal interest in a proposed deposition or who expect their interests to be adequately represented by other counsel may elect not to attend and to conduct, pursuant to paragraph 13 of this order, supplemental interrogation of the deponent should a review of the deposition reveal the need for such examination.

(c) Notice of Intent to Attend a Deposition. To allow counsel to make arrangements for adequate deposition space, counsel who intend to attend a deposition noticed in the above-captioned litigation should advise counsel for the noticing party at least three days prior to the deposition, if feasible.

6. Conduct

- (a) Examination. Each side should ordinarily designate one attorney to conduct the principal examination of the deponent, and examination by other attorneys should be limited to matters not previously covered. Counsel should cooperate so examinations by multiple attorneys do not exceed the allotted time.
- (b) Transmittal of Copies. The attorney who conducts the principal examination for the noticing party is responsible for assuring that a copy of the deposition transcript, diskettes, and any videotapes are provided to the document depository and to liaison counsel.
- (c) Objections and Directions Not to Answer. Counsel shall comply with Fed. R. Civ. P. 30(d)(1). When a privilege is claimed, the witness should nevertheless answer questions relevant to the existence, extent, or waiver of the privilege, such as the date of a communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement, unless such information is itself privileged.

Any objection made at a deposition shall be deemed to have been made on behalf of all other parties. All objections, except those relating to form and foundation, are preserved.

- (d) Private Consultation. Private conferences between deponents and their attorneys in the course of interrogation are improper except for the purpose of determining whether a privilege should be asserted. Unless prohibited by the court for good cause shown, such conferences may be held during normal recesses and adjournments.
- (e) Continuation of Deposition. If a deposition is not finished on Friday of a deposition week, it will continue on the following Monday, subject to the availability of the witness. If the witness is unavailable, it will resume on a newly noticed date.

7. Documents

(a) *Production of Documents*. Witnesses subpoenaed to produce documents should ordinarily be served at least 30 days before the scheduled deposition.

- Arrangements should be made to permit inspection of the documents before the interrogation commences.
- (b) Confidentiality Order. A copy of the confidentiality order shall be provided to the deponent before the deposition commences if the deponent is to produce or may be asked about documents that may contain confidential information. [Counsel shall comply with the provisions of the confidentiality order when examining a deponent about confidential information.]
- (c) Copies. Extra copies of documents about which counsel expect to examine the deponent should ordinarily be provided to opposing counsel and the deponent. Deponents should be shown a document before being examined about it except when counsel seek to impeach or test the deponent's recollection.
- (d) *Marking of Deposition Exhibits*. Documents shall be referred to by the unique alpha-numeric identifier assigned by the document depository.
- 8. Depositions of Witnesses Who Have No Knowledge of the Facts. An officer, director, or managing agent of a corporation or a government official served with a notice of a deposition or subpoena regarding a matter about which such person has no knowledge may submit to the noticing party, a reasonable time before the date noticed, an affidavit so stating and identifying a person within the corporation or government entity believed to have such knowledge. Notwithstanding such affidavit, the noticing party may proceed with the deposition, subject to the right of the witness to seek a protective order.
- 9. Recording Depositions by Nonstenographic Means
 - (a) Tape-Recorded Depositions. By so indicating in its notice of a deposition, a party may record the deposition by tape recording in lieu of stenographic recording pursuant to Fed. R. Civ. P. 30(b)(2) and (3). Other parties may at their own expense arrange for stenographic recording of the deposition, may obtain a copy of the tape and transcript upon payment of a pro rata share of the noticing party's actual costs, and may prepare and file their own version of the transcript of the tape recording.
 - (b) Videotaped Depositions. By so indicating in its notice of a deposition, a party may record the deposition by videotape pursuant to Fed. R. Civ. P. 30(b)(2) and (3).
 - (1) Rules for Videotaped Reporting
 - (i) Video Operator. The operator(s) of the videotape recording equipment shall be subject to the provisions of Fed. R. Civ. P. 28(c). At the commencement of the deposition the operator(s) shall swear or affirm to record the proceedings fairly and accurately.
 - (ii) Attendance. Each witness, attorney, and other person attending the deposition shall be identified on camera at the commencement of the deposition. Thereafter, only the deponent (and demonstrative materials used during the deposition) will be videotaped.

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(iii) Standards. The deposition will be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at a trial. Unless physically incapacitated, the deponent shall be seated at a table or in a witness box except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition will be conducted in a neutral setting, against a solid background, with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting, and field of view will be changed only as necessary to record accurately the natural body movements of the deponent or to portray exhibits and materials used during the deposition. Sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the deponent. Eating and smoking by deponents or counsel during the deposition will not be permitted.

- (iv) *Interruptions*. [The videotape shall run continuously throughout the active conduct of the deposition.] [Videotape recording will be suspended during all "off the record" discussions.]²
- (v) Index. The videotape operator shall use a counter on the recording equipment and after completion of the deposition shall prepare a log, cross-referenced to counter numbers, that identifies the positions on the tape at which examination by different counsel begins and ends, objections are made and examination resumes at which exhibits are identified, and any interruption of continuous tape recording occurs, whether for recesses, "off the record" discussions, mechanical failure, or otherwise.
- (vi) Filing. [The operator shall preserve custody of the original videotape in its original condition until further order of the court.] [Subject to the provisions of paragraph 10 of this order, the original of the tape recording, together with the operator's log index and a certificate of the operator attesting to the accuracy of the tape, shall be filed with the clerk.] No part of a videotaped deposition shall be released or made available to any member of the public unless authorized by the court.
- (vii) Objections. Requests for pretrial rulings on the admissibility of evidence obtained during a videotaped deposition shall be accompanied by appropriate pages of the written transcript. If needed for an informed ruling, a copy of the videotape and equipment for viewing the tape shall also be provided to the court.
- (viii) *Use at Trial; Purged Tapes.* A party desiring to offer a videotape deposition at trial shall be responsible for having available appropriate playback equipment and a trained operator. After the designation by all parties of the portions of a videotape to be used at trial, an edited copy of the tape, purged of unnecessary portions (and any portions to which objections have been sustained), [may] [shall] be pre-

pared by the offering party to facilitate continuous playback; but a copy of the edited tape shall be made available to other parties at least ____ days before it is used, and the unedited original of the tape shall also be available at the trial.

- 10. Telephonic Depositions. By indicating in its notice of a deposition that it wishes to conduct the deposition by telephone, a party shall be deemed to have moved for such an order under Fed. R. Civ. P. 30(b)(7). Unless an objection is filed and served within _____ days after such notice is received, the court shall be deemed to have granted the motion. Other parties may examine the deponent telephonically or in person. However, all persons present with the deponent shall be identified in the deposition and shall not, by word, sign, or otherwise, coach or suggest answers to the deponent.
- 11. Waiver of Transcription and Filing. The parties and deponents are authorized and encouraged to waive transcription and filing of depositions that prove to be of little or no usefulness in the litigation or to agree to defer transcription and filing until the need for using the deposition arises.
- 12. Use. Depositions conducted in this litigation may be used in related cases in any state court to the extent permitted by that state's laws and rules. Depositions may, under the conditions prescribed in Fed. R. Civ. P. 32(a)(1)–(4) or as otherwise permitted by the Federal Rules of Evidence, be used against any party (including parties later added and parties in cases subsequently filed in, removed to, or transferred to this court as part of this litigation):
 - (a) who was present or represented at the deposition;
 - (b) who had reasonable notice thereof; or
 - (c) who, within 30 days after the filing of the deposition (or, if later, within 60 days after becoming a party in this court in any action that is a part of this litigation), fails to show just cause why such deposition should not be usable against such party.
- 13. Supplemental Depositions. Each party not present or represented at a deposition (including parties later added and parties in cases subsequently filed in, removed to, or transferred to this court) may, within 30 days after the filing of the deposition (or, if later, within 60 days after becoming a party in this court in any action that is a part of this litigation), request permission to conduct a supplemental deposition of the deponent, including the right to take such deposition telephonically and by nonstenographic means. If permitted, the deposition shall be treated as the resumption of the deposition originally noticed; and each deponent shall, at the conclusion of the initial deposition, be advised of the opportunity of nonattending parties to request a resumption of such deposition, subject to the right of the deponent to seek a protective order. Such examination shall not be repetitive of the prior interrogation.

14. Disputes During Depositions

(a) Disputes between the parties that arise during a deposition should be addressed to this [MDL] court rather than the district court in which the depo-

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sition is being conducted. The undersigned will exercise by telephone the authority granted under 28 U.S.C. § 1407(b) to act as district judge in the district in which the deposition is taken.²

(b) Immediate Presentation. Disputes arising during depositions that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule or require a rescheduling of the deposition, should be presented by telephone to the court. If the judge is not available during the period while the deposition is being conducted, the dispute may be submitted to Magistrate Judge _______ by telephone or as the judge may direct.³ The presentation of the issue and the court's ruling will be recorded as part of the deposition.⁴

Dated:	
	United States District Judge

Notes:

- 1. See supra section 11.45.
- 2. The power to exercise authority over nonparty deponents outside the district is available only in multidistrict litigation, unless the judge has been given an intracircuit or intercircuit assignment.
 - 3. See supra section 11.456.
- 4. If a simultaneous stenographic transcript is being made, the court may prefer that "off the record" discussions be eliminated from the videotape.



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(Cite as: 253 F.R.D. 354)

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United States District Court,
D. Maryland.
Glenda MANCIA, et al., Plaintiffs,

v.

MAYFLOWER TEXTILE SERVS. CO., et al., Defendants.

Civ.A. No. 1:08–CV–00273–CCB. Oct. 15, 2008.

Background: Employees brought putative collective action under Fair Labor Standards Act (FLSA) against employer and related parties, alleging failure to pay overtime wages and illegal deductions from wages. Employees moved to compel responses to interrogatories and document requests.

Holdings: The District Court, Paul W. Grimm, Chief United States Magistrate Judge, held that:

- (1) boilerplate objections to employees' discovery requests served as waiver of any legitimate objections defendants may have had, and
- (2) employees' extensive discovery requests warranted sua sponte order that counsel confer to determine range of possible damages.

Ordered accordingly.

West Headnotes

[1] Federal Civil Procedure 170A \$\infty\$ 1261

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1261 k. In General. Most Cited

Cases

Federal Civil Procedure 170A € 1278

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General

170Ak1278 k. Failure to Respond; Sanctions. Most Cited Cases

Purposes of procedural rule requiring attorneys to sign discovery requests/responses/objections, and authorizing sanctions for improper certification, include deterring parties from seeking discovery, cost and burden of which is disproportionally large to what is at stake in the litigation, and deterring practice of objecting to discovery requests reflexively, without factual basis. Fed.Rule Civ.Proc.Rule 26(g)(1)(B)(iii), 28 U.S.C.A.

[2] Federal Civil Procedure 170A \$\infty\$ 1483

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(D) Written Interrogatories to Parties

170AX(D)1 In General

170Ak1483 k. Objections and Grounds
for Refusal. Most Cited Cases

Federal Civil Procedure 170A € 1558.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)1 In General

170Ak1558 Objections and Grounds

for Refusal

170Ak1558.1 k. In General. Most

Cited Cases

In employees' collective action against employer alleging violation of FLSA's overtime pay provisions, employer's boilerplate objections to employees' interrogatories and document production requests waived any legitimate objections to discovery requests that employer might have had; either employer lacked factual basis to make objections, constituting violation of certification rule, or proper inquiry was made before objections, but objections were not specified as required. Fed.Rule Civ.Proc.Rule, 26(g), 33(b)(4), 34, 28 U.S.C.A.

[3] Federal Civil Procedure 170A \$\infty\$=1272.1

170A Federal Civil Procedure 170AX Depositions and Discovery 170AX(A) In General 170Ak1272 Scope

170Ak1272.1 k. In General. Most

Cited Cases

In employees' collective action against employer alleging violation of FLSA's overtime pay provisions, employees' extensive pretrial discovery requests warranted sua sponte order that parties' counsel confer to determine range of possible damages, i.e. amount in controversy, and attempt to reach agreement on scope of discovery; there was possibility that burden or expense of proposed discovery outweighed its likely benefit, since action involved low number of named plaintiffs and relatively modest amounts of wages. Fed.Rule Civ.Proc.Rule 26(b)(2)(C)(iii), 28 U.S.C.A.

*354 Daniel Adlai Katz, Andalman and Flynn PC, Silver Spring, MD, C. Christopher Brown, Jane Reisen Flanagan, Brown Goldstein and Levy LLP, Baltimore, MD, for Plaintiffs.

Scott Victor Kamins, Eric J. Pelletier, Offit Kurman PA, Maple Lawn, MD, Andrew T. Nichols, Rollins Smalkin Richards and Mackie LLC, Baltimore, MD, Neil Stuart Hyman, Selzer Gurvitch Rabin and Obecny Chtd., Bethesda, MD, for Defendants.

*355 MEMORANDUM OPINION

PAUL W. GRIMM, Chief United States Magistrate Judge.

On January 31, 2008, Glenda Mancia, Maria Daysi Reyes, Alfredo Aguirre, Henri Sosa, Sandra Suzao and Obdulia Martinez ("Plaintiffs"), individually and on behalf of all similarly situated employees, filed a collective action against Mayflower Textile Services Co., Mayflower Healthcare Textile Services, LLC, Mayflower Surgical Service, Inc., Mayflower Uniforms and Medical Supplies, LLC, Lunil Services Agency, LLC, Argo Enterprises, Inc. and Mukul M. Mehta ("Defendants") for declarat-

ory and monetary relief under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201 et seq. Pls.' Com., Paper No. 1. The Plaintiffs contended that the Defendants violated section § 207(a)(1) of the FLSA by knowingly failing to compensate Plaintiffs for overtime work and illegally deducting wages from the Plaintiffs' pay. Id. ¶¶ 37–40. The Plaintiffs further alleged that the supposed failure to provide overtime pay was a violation of the Maryland Wage and Hour Law, Md.Code Ann., Labor & Employ. §§ 3–401 et seq., and the Maryland Wage Payment and Collection Act, Md.Code Ann., Labor & Employ. §§ 3–501 et seq. Id. ¶¶ 41–50.

On April 18, 2008, the Plaintiffs served interrogatories and document production requests on the Defendants. Certificate of Counsel Pursuant to Local Rule 104.7 at 1, Paper No. 42. Plaintiffs assert that the Defendants' responses were wholly "inadequate," and on June 25, 2008, the Plaintiffs served FN1 Motions to Compel Supplemental Responses to Interrogatories and Document Requests on Defendants Mayflower, Mehta and Lunil. Id. On June 30, 2008, the Plaintiffs served an additional Motion to Compel on Defendant Argo. Id. On July 14, 2008, Defendants Mayflower, Lunil and Mehta served on the Plaintiffs a Consolidated Response to the Motions to Compel, Paper No. 42, # 5. Afterwards, on July 25, 2008, the Plaintiffs served Defendants Mayflower, Mehta and Lunil with Replies to the Defendants' Responses to the Motions to Compel Supplemental Responses, Paper No. 42, 7-9. On August 1, 2008, Defendants Mayflower, Lunil and Mehta served on the Plaintiffs an Amended Consolidated Response, Paper No. 42, # 6. Defendant Argo did not file an opposition to the Plaintiffs' Motion.

FN1. Plaintiffs properly complied with Local Rule 104.8, and did not file their Motions, or the Responses they received, until after the briefing was complete and counsel had conferred.

On August 18, 2008, the Plaintiffs, having

complied with Local Rule 104.8, filed Motions to Compel Defendants to Serve Supplemental Responses and Memoranda in Support Thereof, Paper No. 42, 2–4, 10, attaching all the memoranda and exhibits that had been served by the parties. On August 28, 2008, this case was referred to me for the purposes of resolving all discovery disputes. Paper No. 45.

The Motions, Responses and Replies filed were extensive. In regards to Defendant Mayflower, the Plaintiffs raised issues relating to fourteen document requests and sought two supplemental interrogatory responses. Pls.' Mot. Compel Def. Mayflower 2-14. The documents requested included the following: (1) an attachment or attachments to the contract between Defendant Mayflower and Defendant Lunil; (2) an attachment or attachments to the contract between Defendant Mayflower and Defendant Argo; (3) documents that support the making and execution of the contract between Defendant Mayflower and Defendant Lunil; (4) documents that support the making and execution of the contract between Defendant Mayflower and Defendant Argo; (5) all documents indicating the days and hours worked by the Plaintiffs; (6) all records concerning wages earned by the Plaintiffs; (7) postings in Defendant Mayflower's place of business that inform workers of their wage and overtime rights; (8) all documents related to Defendant Mayflower's payment to Defendant Lunil for labor performed by employees at Defendant Mayflower's place of business; (9) all documents related to Defendant Mayflower's payment to Defendant Argo for labor performed by employees at Defendant Mayflower's place of business; (10) all documents regarding vehicles in which employees of Defendant*356 Mayflower were transported to and from work; (11) records showing all production workers who worked at Defendant Mayflower's place of business during the last two pay periods of 2007 and the first pay period of 2008; (12) payroll based tax documents and filings for the period relevant to the litigation; (13) all documents showing the relationship with individual workers and Defendant Mayflower;

(14) documents regarding the ownership of Defendant Mayflower. *Id.* at 2–12, Reqs. 1–7, 15–17, 21–23, 26, 28. The requested supplemental interrogatory responses sought the identity of the person or persons answering the interrogatories, and a description of the business operations of Defendant Mayflower. *Id.* at 12–14, Interrogs. 1, 3.

With Defendant Lunil, the Plaintiffs raised issues about ten document requests and sought two supplemental interrogatory responses. Pls.' Mot. Compel Def. Lunil 2–10, Reqs. 1–4, 12–13, 17, 19, 22, 25, Interrogs. 11, 3. As for Defendant Mehta, the Plaintiffs had issues with only two document requests. Pls.' Mot. Compel Def. Mehta 2–4, Reqs. 1–2. In essence, Plaintiffs sought the same type of information from Defendants Lunil and Mehta as they did from Defendant Mayflower.

Finally, the Plaintiffs raised issues about twenty-five document requests served on Defendant Argo, and further sought one supplemental interrogatory response. Pls.' Mot. Compel Def. Argo 2-10, Reqs. 1-25, Interrog. # 3. On September 29, 2008, Plaintiffs submitted correspondence notifying the Court of the resolution of four discovery disputes with Defendant Mayflower, three discovery disputes with Defendant Lunil and twenty disputes with Defendant Argo. FN2 Having resolved most of their differences with Defendant Argo, the Plaintiffs still sought certain company records and also requested that Defendant Argo supplement its interrogatory response regarding the nature of its business, the locations and addresses where business operations had been conducted and the identities of its managerial and supervisory staff at each location. Id. at 1-10, Regs. 3-4, 12, 19, 21, Interrog. # 3.

FN2. Pls.' Correspondence 1–4, Paper No. 50 (resolving Pls.' Mot. Compel Def. Mayflower, Reqs. 1, 17, Interrogs. 1, 3; Pls.' Mot. Compel Def. Lunil, Reqs. 1, 13, Interrog. # 1; Pls.' Mot. Compel Def. Argo, Reqs. 1–2, 5–11, 13–18, 20, 22–25).

During my review of the objections originally served by the Defendants in their Responses to Plaintiffs' discovery requests, I noted an obvious violation of Fed.R.Civ.P. 33(b)(4) (which requires that the grounds for objecting to an interrogatory must be stated with specificity, or else they are waived) and the ruling in Jayne H. Lee, Inc. v. Flagstaff Indus., 173 F.R.D. 651, 655 (D.Md.1997) (also noting the obligation to particularize objections to interrogatories, on pain of waiver). Similarly, facially apparent violations of Fed.R.Civ.P. 34(b)(2), the rulings of the court in Jayne H. Lee, Inc., 173 F.R.D. at 656 (failure to respond to document production request in one of three appropriate ways) and Hall v. Sullivan, 231 F.R.D. 468, 473-74 (D.Md.2005) (failure to object with particularity to document production request waives objection), were noted.

Further, the failure by the Defendants to particularize their objections to Plaintiffs' discovery requests suggested a probable violation of Fed.R.Civ.P. 26(g)(1) (failure to conduct a "reasonable inquiry" before objecting to an interrogatory or document request). As a result of these apparent discovery violations, I scheduled an incourt hearing with counsel to address them.

This hearing took place on September 29, 2008. During the hearing I raised with counsel my concerns about the objections that had been filed by Defendants, as well as concern about the breadth of the Plaintiffs' discovery requests, and the possibility that they were excessively broad and costly, given what is at stake in this case. I advised counsel that the dispute appeared to be one that could be resolved, or substantially minimized, by greater communication and cooperation between counsel and the parties, and provided detailed suggestions for counsel to follow at a meet and confer session. I also explained that I would prepare a written opinion to more fully explain my concerns, suggestions and rulings, and instructed counsel how to respond if, after the conference, *357 there continue to be disputes requiring court resolution. This memorandum provides that explanation.

One of the most important, but apparently least understood or followed, of the discovery rules is Fed.R.Civ.P. 26(g), enacted in 1983. The rule requires that every discovery disclosure, request, response or objection must be signed by at least one attorney of record, or the client, if unrepresented. Fed.R.Civ.P. 26(g)(1). The signature "certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry," the disclosure is complete and correct, and that the discovery request, response or objection is: (a) consistent with the rules of procedure and warranted by existing law (or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law); (b) is not interposed for any improper purpose (such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation); and (c) is neither unreasonable nor unduly burdensome or expensive, (considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action). Fed.R.Civ.P. 26(g)(1)(A), (B)(i)-(iii) (emphasis added). If a lawyer or party makes a Rule 26(g) certification that violates the rule, without substantial justification, the court (on motion, or sua sponte) must impose an appropriate sanction, which may include an order to pay reasonable expenses and attorney's fees, caused by the violation. Fed.R.Civ.P. 26(g)(3).

[1] The Advisory Committee's Notes to Rule 26(g) significantly flesh it out:

Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection....

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to *act responsibly and avoid abuse*. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection....

Although the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.

The duty to make a "reasonable inquiry" is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11....

••••

Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. Sanctions to deter discovery abuse would be more effective if they were diligently applied "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."

Fed.R.Civ.P. 26(g) advisory committee's notes to the 1983 amendments (emphasis added) (citations omitted). Rule 26(g) and its commentary provide many important "take away points" that ought to, but unfortunately do not, regulate the way discovery is conducted. First, the rule is intended to impose an "affirmative duty" on counsel to behave responsibly during discovery, and to ensure that it is conducted in a way that is consistent "with the spirit and purposes" of the discovery rules, which

are contained in Rules 26 through 37. *Id.* It cannot seriously be disputed that compliance with the "spirit and purposes" of these discovery rules requires cooperation by counsel to identify and *358 fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionally large to what is at stake in the litigation. Counsel cannot "behave responsively" during discovery unless they do both, which requires cooperation rather than contrariety, communication rather than confrontation.

Second, the rule is intended to curb discovery abuse by requiring the court to impose sanctions if it is violated, absent "substantial justification," and those sanctions are intended to both penalize the noncompliant lawyer or unrepresented client, and to deter others from noncompliance. Fed.R.Civ.P. 26(g)(3). As the Advisory Committee's Notes state, "Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. § 1927, and the court's inherent authority." Fed.R.Civ.P. 26(g) advisory committee's notes to the 1983 amendments (internal citations omitted).

Third, the rule aspires to eliminate one of the most prevalent of all discovery abuses: kneejerk discovery requests served without consideration of cost or burden to the responding party. Despite the requirements of the rule, however, the reality appears to be that with respect to certain discovery, principally interrogatories and document production requests, lawyers customarily serve requests that are far broader, more redundant and burdensome than necessary to obtain sufficient facts to enable them to resolve the case through motion, settlement or trial. The rationalization for this behavior is that the party propounding Rule 33 and 34 discovery does not know enough information to more narrowly tailor them, but this would not be so if lawyers approached discovery responsibly, as the

rule mandates, and met and conferred before initiating discovery, and simply discussed what the amount in controversy is, and how much, what type, and in what sequence, discovery should be conducted so that its cost—to all parties—is proportional to what is at stake in the litigation. The requirement of discovery being proportional to what is at issue is clearly stated at Rule 26(g)(1)(B)(iii) (lawyer's signature on a discovery request certifies that it is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action"), as well as Rule 26(b)(2)(C)(i)-(iii) (court, on motion or on its own, must limit the scope of discovery if the discovery sought is unreasonably cumulative or duplicative, can be obtained from a more convenient source, could have been previously obtained by the party seeking the discovery or the burden or expense of the proposed discovery outweighs its likely benefit).

Similarly, Rule 26(g) also was enacted over twenty-five years ago to bring an end to the equally abusive practice of objecting to discovery requests reflexively-but not reflectively-and without a factual basis. The rule and its commentary are starkly clear: an objection to requested discovery may not be made until after a lawyer has "paused and consider[ed]" whether, based on a "reasonable inquiry," there is a "factual basis [for the] ... objection." Fed.R.Civ.P. 26(g) advisory committee's notes to the 1983 amendments. Yet, as in this case, boilerplate objections that a request for discovery is "overboard and unduly burdensome, and not reasonably calculated to lead to the discovery of material admissible in evidence," Pls.' Mot. Compel Def. Mayflower 3, Req. # 2, persist despite a litany of decisions from courts, including this one, that such objections are improper unless based on particularized facts. See, e.g., A. Farber & Partners, Inc. v. Garber, 234 F.R.D. 186, 188 (C.D.Cal.2006); Hall, 231 F.R.D. at 470; Wagner v. Dryvit Sys. Inc., 208 F.R.D. 606, 610 (D.Neb.2001) (citing Roesberg v. Johns-Manville Corp., 85 F.R.D. 292, 296-97

(E.D.Pa.1980)); Thompson v. HUD, 199 F.R.D. 168, 173 (D.Md.2001); Marens v. Carrabba's Italian Grill, Inc., 196 F.R.D. 35, 38 (D.Md.2000) (citing Tucker v. Ohtsu Tire & Rubber Co., 191 F.R.D. 495, 498 (D.Md.2000) (citations omitted); Kelling v. Bridgestone/Firestone, Inc., 157 F.R.D. 496, 497 (D.Kan.1994); Eureka Fin. Corp. v. Hartford Accident & Indem. Co., 136 F.R.D. 179, 182-83 (E.D.Ca.1991); *359Willemijn Houdstermaatschaapij BV v. Apollo Computer, Inc., 707 F.Supp. 1429, 1439-40 (D.Del.1989)); Momah v. Albert Einstein Med. Ctr., 164 F.R.D. 412, 417 (E.D.Pa.1996); Obiajulu v. City of Rochester, Dept. of Law, 166 F.R.D. 293, 295 (W.D.N.Y.1996); Harding v. Dana Transport, Inc., 914 F.Supp. 1084, 1102 (D.N.J.1996).

It would be difficult to dispute the notion that the very act of making such boilerplate objections is prima facie evidence of a Rule 26(g) violation, because if the lawyer had paused, made a reasonable inquiry, and discovered facts that demonstrated the burdensomeness or excessive cost of the discovery request, he or she should have disclosed them in the objection, as both Rule 33 and 34 responses must state objections with particularity, on pain of waiver. Fed R. Civ. P. 33(b)(4) ("The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure."); see also Beverly v. Depuy Orthopaedics, Inc., No. 3:07-CV-137 AS, 2008 WL 45357, at *2 (N.D.Ind.2008) ("An underdeveloped argument, or argument not raised at all, is a waived argument."); DL v. District of Columbia, 251 F.R.D. 38, 43 (D.D.C.2008) ("When faced with general objections, the applicability of which to specific document requests is not explained further, '[t]his Court will not raise objections for [the responding party],' but instead will 'overrule[] [the responding party's] objection[s] on those grounds.' ") (quoting Tequila Centinela, S.A. de C.V. v. Bacardi & Co., Ltd., 242 F.R.D. 1, 12 (D.D.C.2007)); Johnson v. Kraft Foods North America, Inc., 236 F.R.D. 535, 538 (D.C.Kan.2006)

("The Court ... holds that a general objection which objects to a discovery request 'to the extent' that it asks the responding party to provide certain categories of documents or information is tantamount to asserting no objection at all. In other words, such a general objection does not preserve the asserted challenge to production."); Hall, 231 F.R.D. at 473–74 (objections to Rule 34 document production requests must be stated with particularity or are waived); Swackhammer v. Sprint Corp. PCS, 225 F.R.D. 658, 660–61 (D.Kan.2004) ("This Court has on several occasions disapproved of the practice of asserting a general objection 'to the extent' it may apply to particular requests for discovery. This Court has characterized these types of objections as worthless for anything beyond delay of the discovery. Such objections are considered mere hypothetical or contingent possibilities, where the objecting party makes no meaningful effort to show the application of any such theoretical objection to any request for discovery. Thus, this Court has deemed such ostensible objections waived or [has] declined to consider them as objections.") (quoting Sonnino v. Univ. of Kan. Hosp. Auth., 221 F.R.D. 661, 666-67 (D.Kan.2004) (internal quotations and citations omitted)).

The failure to engage in discovery as required by Rule 26(g) is one reason why the cost of discovery is so widely criticized as being excessive—to the point of pricing litigants out of court. See, e.g., Am. Coll. of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., Interim Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System 3 (2008) ("Although the civil justice system is not broken, it is in serious need of repair. The survey shows that the system is not working; it takes too long and costs too much. Deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test, while meritless cases, especially smaller cases, are being settled rather than being tried because it costs too much to litigate them."); Gregory P. Joseph, Trial Balloon:

Federal Litigation—Where Did It Go Off Track?, Litig., Summer 2008, at 62 (observing that discovery costs, particularly related to ESI discovery, is partly responsible for making federal litigation "procedurally more complex, risky to prosecute, and very expensive," causing litigants to avoid litigating in federal court); The Sedona Conference, The Sedona Conference Cooperation Proclamation 1 (2008) [hereinafter Cooperation Proclamation], available at http:// www. thesedona conference. org/ content/ misc Files/ cooperation Proclamation Press. pdf ("The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the *360 American judicial system. This burden rises significantly in discovery of electronically stored information ("ESI"). In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes—in some cases precluding adjudication on the merits altogether"); Kent D. Syverud, ADR and the Decline of the American Civil Jury, 44 UCLA L.Rev. 1935, 1942 (1997) ("Our civil process before and during trial, in state and federal courts, is a masterpiece of complexity that dazzles in its details—in discovery, in the use of experts, in the preparation and presentation of evidence, in the selection of the factfinder and the choreography of the trial. But few litigants or courts can afford it.").

Comparing these recent lamentations about the costs of civil litigation to those voiced eighteen years ago when the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471 et seq., was passed, and comprehensive changes to the discovery rules enacted, reflects that little has changed, despite concerted efforts to do so:

Perhaps the greatest driving force in litigation today is discovery. Discovery abuse is a principal cause of high litigation transaction costs. Indeed, in far too many cases, economics—and not the merits—govern discovery decisions. Litigants of moderate means are often deterred through discovery from vindicating claims or defenses, and

the litigation process all too often becomes a war of attrition for all parties....

• • • •

Excessive and abusive discovery has been recognized as a serious problem for some time. More than 10 years ago, a study of Federal trial judges in two district courts found that they perceived "unnecessary, expensive, overburdening discovery as a substantial threat to the efficient and just functioning of the federal trial system for civil litigation." In 1980, a study of lawyers in Chicago found that 49 percent of those practicing in Federal courts believe that "overdiscovery" is a major abuse of the discovery process.

S.Rep. No. 101–650, at 20–21, *as reprinted in* 1990 U.S.C.C.A.N. 6823–24 (internal citations omitted).

Rule 26(g) charges those responsible for the success or failure of pretrial discovery—the trial judge and the lawyers for the adverse parties—with approaching the process properly: discovery must be initiated and responded to responsibly, in accordance with the letter and spirit of the discovery rules, to achieve a proper purpose (i.e., not to harass, unnecessarily delay, or impose needless expense), and be proportional to what is at issue in the litigation, and if it is not, the judge is expected to impose appropriate sanctions to punish and deter.

The apparent ineffectiveness of Rule 26(g) in changing the way discovery is in fact practiced often is excused by arguing that the cooperation that judges expect during discovery is unrealistic because it is at odds *361 with the demands of the adversary system, within which the discovery process operates. But this is just not so. The adversary system has been aptly summarized as follows:

FN3. Courts repeatedly have noted the need for attorneys to work cooperatively to conduct discovery, and sanctioned lawyers and parties for failing to do so. See, e.g.,

Board of Regents of the Univ. of Nebraska v. BASF Corp., 2007 WL 3342423, at *5 (D.Neb. Nov. 5, 2007) ("The overriding theme of recent amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable."); Network Computing Servs. Corp. v. CISCO Sys., Inc., 223 F.R.D. 392 (D.S.C.2004). In Network Computing Servs., the court discussed problems caused by failures of counsel and parties to approach discovery more cooperatively and professionally, stating, "The discovery beast has yet to be tamed." 223 F.R.D. at 395 (quoting Patrick E. Higginbotham, So Why Do We Call Them Trial Courts?, 55 SMU L.Rev. 1405, 1417 (2002)), and taking note of United States District Judge Wayne Alley's caustic observation that "[i]f there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes." Id. (quoting Krueger v. Pelican Prod. Corp., C/A No. 87-2385-A, slip op. (W.D.Okla. Feb. 24, 1989)). The district court judge affirmed the recommendation of a magistrate judge that sanctions for discovery abuse were appropriate, and instead of imposing a monetary sanction, ordered that the jury would be informed of the misconduct. Id. at 395-401. See also, e.g., Buss v. Western Airlines, Inc., 738 F.2d 1053, 1053-54 (9th Cir.1984) ("The voluminous file in this case reveals that a vast amount of lawyer time on both sides was expended in largely unnecessary paper shuffling as the parties battled over discovery and preliminary matters.... It is not the purpose of this decision to assess fault. The trial judge, however, was not at fault.

A judge with a caseload to manage must depend upon counsel meeting each other and the court halfway in moving a case toward trial."); Flanagan v. Benicia Unified Sch. Dist., 2008 WL 2073952, at *10 (E.D.Cal.2008) ("The abusiveness of plaintiff's discovery responses indicate a lack of cooperative spirit.... [P]laintiff's wilful disregard of the Federal Rules, and her lack of communication and cooperation with defense counsel in regard to all discovery, undermine the judicial process plaintiff herself has invoked."); Marion v. State Farm Fire and Casualty Co., 2008 WL 723976, at *3-4 (S.D.Miss. Mar. 17, 2008) ("[T]he gravest 'error' committed by the Magistrate [Judge] was thinking that 'the parties [could] meet and confer to discuss any outstanding discovery requests,' because after this 'meet and confer' it was 'clear that the parties had done little to resolve their perceived differences on document production.'... This Court demands the mutual cooperation of the parties. It hopes that some agreement can be reached.... Neither [the Magistrate Judge] nor this Court will hesitate to impose sanctions on any one-party or counsel or both—who engages in any conduct that causes unnecessary delay or needless increase in the costs of litigation." (citing Fed.R.Civ.P. 26(g))); Malot v. Dorado Beach Cottages Assocs., 478 F.3d 40, 45 (1st Cir.2007) (sustaining certain sanctions imposed by district court for discovery violations and noting with disapproval the lack of cooperation and responsiveness of defendants to plaintiff's attempts to comply with the discovery schedule); In re Spoonemore, 370 B.R. 833, (Bkrtcy.D.Kan.2007) ("Discovery should not be a sporting contest or a test of wills, particularly in a bankruptcy case where the parties' resources are limited and the dollar value of the stakes is often low. When a

party and its counsel are as intransigent and uncooperative in discovery as [the parties] have been in this matter, the Court has no choice but to impose sanctions that, hopefully, emphasize that the conduct sanctioned is both unprofessional and unacceptable."); Sweat v. Peabody Coal Co., 94 F.3d 301, 306 (7th Cir.1996) ("This Court cannot determine where the fault in this latest breakdown of attempted discovery lies. The Court is therefore assuming that both attorneys have failed in this regard. This Court is not happy with the progress, or should say lack of progress, relating to getting this case ready for trial. It is apparent that the attorneys involved in this case do not like each other, do not get along, and will not cooperate in the discovery process. The people who suffer when this happens are the parties.").

The central precept of the adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both the parties and society. This formulation is advantageous not only because it expresses the overarching adversarial concept, but also because it identifies the method to be utilized in adjudication (the sharp clash of proofs in a highly structured setting), the actors essential to the process (two adversaries and a decision maker), the nature of their functions (presentation of proofs and adjudication of disputes, respectively), and the goal of the entire endeavor (the resolution of disputes in a manner acceptable to the parties and to society).

Stephen Landsman, A.B.A. Section of Litigation, Readings on Adversarial Justice: The American Approach to Adjudication 2 (1988). However central the adversary system is to our way of formal dispute resolution, there is nothing inherent in it that precludes cooperation between the

parties and their attorneys during the litigation process to achieve orderly and cost effective discovery of the competing facts on which the system depends. In fact, no less a proponent of the adversary system than Professor Lon L. Fuller FN4 observed:

FN4. Professor Fuller, 1902–1978, was a celebrated professor at Harvard Law School who wrote extensively on jurisprudence, including the importance of the adversary system. His publications include the influential article *The Forms and Limits of Adjudication*, 92 Harv. L.Rev. 353 (1978).

Thus, partisan advocacy is a form of public service so long as it aids the process of adjudication; it ceases to be when it hinders that process, when it misleads, distorts and obfuscates, when it renders the task of the deciding tribunal not easier, but more difficult.

....

The lawyer's highest loyalty is at the same time the most tangible. It is loyalty that runs, not to persons, but to procedures*362 and institutions. The lawyer's role imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends.

... A lawyer recreant to his responsibilities can so disrupt the hearing of a cause as to undermine those rational foundations without which an adversary proceeding loses its meaning and its justification. Everywhere democratic and constitutional government is tragically dependant on voluntary and understanding co-operation in the maintenance of its fundamental processes and forms.

It is the lawyer's duty to preserve and advance this indispensable co-operation by keeping alive the willingness to engage in it and by imparting the understanding necessary to give it direction and effectiveness....

... It is chiefly for the lawyer that the term "due process" takes on tangible meaning, for whom it indicates what is allowable and what is not, who realizes what a ruinous cost is incurred when its demands are disregarded. For the lawyer the insidious dangers contained in the notion that "the end justifies the means" is not a matter of abstract philosophic conviction, but of direct professional experience.

Lon L. Fuller & John D. Randall, Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1162, 1216 (1958). A lawyer who seeks excessive discovery given what is at stake in the litigation, or who makes boilerplate objections to discovery requests without particularizing their basis, or who is evasive or incomplete in responding to discovery, or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transaction costs, or who delays the completion of discovery to prolong the litigation in order to achieve a tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace is, as Professor Fuller observes, hindering the adjudication process, and making the task of the "deciding tribunal not easier, but more difficult," and violating his or her duty of loyalty to the "procedures and institutions" the adversary system is intended to serve. Thus, rules of procedure, $\stackrel{FN5}{\tiny FN7}$ ethics and even *363 statutes $\stackrel{FN7}{\tiny make}$ clear that there are limits to how the adversary system may operate during discovery.

FN5. See, e.g., Fed.R.Civ.P. 26(f) (requiring parties and their counsel to confer to "consider the nature and basis of their claims and defenses," the possibility of settlement and to develop and agree on a proposed discovery plan to submit to the court); Fed.R.Civ.P. 26(g) (requiring that discovery not be initiated, responded to, or

objections made unless there first has been a reasonable inquiry, and the discovery, response or objection is founded in law, not interposed for an improper purpose, and neither unreasonable nor unduly burdensome); Fed.R.Civ.P. 26(c)(1), 37(a)(1) (prohibiting the filing of discovery motions without first certifying that the moving party has conferred in good faith with the adverse party in an effort to resolve the dispute without court action).

FN6. See, e.g., Model Rules of Prof'l Conduct R. 3.4(d) (2007) ("[A lawyer shall not,] in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party[.]"); Model Rules of Prof'l Conduct R. 3.4 cmt. [1] (2007) ("The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.") (emphasis added). See also Restatement (Third) of the Law Governing Lawyers: Frivolous Advocacy § 110(3) (2000) ("A lawyer may not make a frivolous discovery request, fail to make a reasonably diligent effort to comply with a proper discovery request of another party, or intentionally fail otherwise to comply with applicable procedural requirements concerning discovery."); Restatement (Third) of the Law Governing Lawyers ch. 7, topic 2, introductory n. (2000) ("Advocates are guided primarily by the goal of advancing their individual clients' interests. They are expected to marshal evidence and legal arguments in support of the positions of their respective clients and to cross-examine and otherwise test the evidence and positions of opposing parties, without personal responsibility for the outcome of the proceeding. However, there are limitations on an advocate's forensic freedom. In addition to the general requirement of complying with legal requirements and rulings of tribunals, a lawyer is subject to the constraints described in this Topic concerning frivolous litigation [which includes prohibitions against frivolous advocacy and conduct during discovery].") (internal citations omitted).

FN7. See, e.g., 28 U.S.C. § 1927 (2008) ("Any attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs. expenses, and attorneys' fees reasonably incurred because of such conduct.").

Although judges, scholars, commentators and lawyers themselves long have recognized the problems associated with abusive discovery, what has been missing is a thoughtful means to engage all the stakeholders in the litigation process—lawyers, judges and the public at large—and provide them with the encouragement, means and incentive to approach discovery in a different way. The Sedona Conference, a non-profit, educational research inbest known for its Best Practices Recommendations and Principles for Addressing Electronic Document Production, recently issued a Cooperation Proclamation to announce the launching of "a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery." Cooperation Proclamation, supra, at 1. To accomplish this laudable goal, the Sedona Conference proposes to develop "a detailed understanding and full articulation of the issues and changes needed to obtain cooperative factfinding," as well as "[d]eveloping and distributing

practical 'toolkits' to train and support lawyers, judges, other professionals, and students in techniques of discovery cooperation, collaboration, and transparency." *Id.* at 3. If these goals are achieved, the benefits will be profound. In the meantime, however, the present dispute evidences the need for clearer guidance how to comply with the requirements of Rules 26(b)(2)(C) and 26(g) in order to ensure that the Plaintiffs obtain appropriate discovery to support their claims, and the Defendants are not unduly burdened by discovery demands that are disproportionate to the issues in this case.

FN8. The Sedona Conference, http://www.thesedona conference.org/content/faq (last visited Oct. 8, 2008).

FN9. The Sedona Conference, Best Practices Recommendations and Principles for Addressing Electronic Document Production (rev.2004), available at http://www.thesedona conference.org/content/miscFiles/Sedona Principles 200401.pdf.

[2] As previously noted, Plaintiffs served Rule 33 interrogatories and Rule 34 document production requests on each of the Defendants. Initially, there was communication between counsel, as well as some degree of cooperation, as Plaintiffs agreed to give the Defendants an extension of time to answer this discovery. When they did answer, however, Defendants Mayflower, Lunil and Mehta (all represented by the same counsel) objected to a number of Plaintiffs' document production requests by making boilerplate, non-particularized objections. FN10 Defendant *364 Argo also relied on this practice when objecting to one of the Plaintiffs' interrogatories. FN11 Rule 33(b)(4) requires that "the grounds for objecting to an interrogatory must be stated with specificity" and cautions that "any ground not stated in a timely objection is waived, unless the court, for good cause, excuses the failure"; therefore, the boilerplate objection to Plaintiffs' interrogatory waived any legitimate objection Defendant Argo may have had. Jayne H. Lee, Inc., 173 F.R.D. at 655. The same is true for the boilerplate objections to Plaintiffs' document production requests. *Hall*, 231 F.R.D. at 273–74. The failure to particularize these objections as required leads to one of two conclusions: either the Defendants lacked a factual basis to make the objections that they did, which would violate Rule 26(g), or they complied with Rule 26(g), made a reasonable inquiry before answering and discovered facts that would support a legitimate objection, but they were waived for failure to specify them as required. Neither alternative helps the Defendants' position, and either would justify a ruling requiring that the Defendants provide the requested discovery regardless of cost or burden, because proper grounds for objecting have not been established.

FN10. See, e.g., Pls.' Mot. Compel Def. Mayflower 2–8, Reqs. 1–7, 15–17; Pls.' Mot. Compel Def. Lunil 2–7, Reqs. 1–4, 12, 17, 19; Pls.' Mot. Compel Def. Mehta 2, 4, Reqs. 1–2. Two examples of the Plaintiffs' requests for production of documents, and Defendant Mayflower's responses, are as follows:

DOCUMENT REQUESTS

1. The contract or contracts between each of the Mayflower entities and Lunil Services, Agency, L.L.C. ("Lunil") reflecting Lunil's agreement to provide plant production workers for the Mayflower laundry for all the years in which the agreement or agreements between the Mayflower entities and Lunil were in effect.

RESPONSE: Objection. This request is overly broad and unduly burdensome, and is not reasonably calculated to lead to the discovery of material admissible in evidence at the trial of this matter in that it contains no time limitation whatsoever, and clearly seeks documents outside of the limitations period governing this action. Subject to and without waiv-

ing this objection, see attached agreement between Lunil Services Agency, LLC and Mayflower Healthcare Textile Services, LLC.

4. Any and all correspondence, e-mail, and/or notes of oral conversations, and any other recordings, including documentation of payments that support the formation of a contract between Mayflower and Argo whereby Agro [sic] agreed to provide plant production workers for the Mayflower laundry plant, and any and all records that reflect the terms of that agreement.

RESPONSE: Subject to and without waiving this objection, any responsive non-privileged documents, in [sic] any exist, ill [sic] be produced at a time mutually acceptable to the parties.

Pls.' Mot. Compel Def. Mayflower 2–4, Reqs. 1, 4.

FN11. Pls.' Mot. Compel Def. Argo 10, Interrog. # 3.

[3] However, Rule 26(b)(2)(C) imposes an obligation on the Court, *sua sponte*, to:

[L]imit the frequency or extent of discovery otherwise allowed by [the] rules ... if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in contro-

versy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Fed.R.Civ.P. 26(b)(2)(C)(i)-(iii). I noted during the hearing that I had concerns that the discovery sought by the Plaintiffs might be excessive or overly burdensome, given the nature of this FLSA and wage and hour case, the few number of named Plaintiffs and the relatively modest amounts of wages claimed for each. Because the record before me lacked facts to enable me to make a determination of overbreadth or burden under Rule 26(b)(2)(C), I ordered counsel to meet and confer in good faith and do the following. First, I asked Plaintiffs and Defendants each to estimate the likely range of provable damages that foreseeably could be awarded if Plaintiffs prevail at trial. In doing so, I suggested that the Plaintiffs assume for purposes of this analysis that their pending motion to certify a FLSA collective action would be granted, because doing so would allow the parties to gauge the "worst case" outcome Defendants could face. I then ordered that counsel for Plaintiffs and Defendants compare these estimates and attempt to identify a foreseeable range of damages, from zero if Plaintiffs do not prevail, to the largest award they likely could prove if they succeed. I also asked Plaintiffs' counsel to estimate their attorneys' fees. While admittedly a rough estimate, this range is useful for determining what the "amount in controversy" is in the case, and what is "at stake" for purposes of Rule 26(b)(2)(C)'s proportionality analysis. The goal is to attempt to quantify a workable "discovery budget" that is proportional to what is at issue in the case.

Second, I ordered Plaintiffs' counsel and Defendants' counsel to discuss the amount and type of discovery already provided, and then discuss the additional discovery still sought by Plaintiffs, in order to evaluate the Rule 26(b)(2)(C) factors, to determine whether Plaintiffs' legitimate additional discovery needs could be fulfilled from non-duplicative, more convenient, less burdensome, or

less expensive sources than those currently sought by the Plaintiffs. I further instructed Defendants' counsel that during this portion of the discussion, the burden was on the *365 Defendants to provide a particularized factual basis to support any claims of excessive burden or expense.

I then advised counsel that in their discussion they should attempt to reach an agreement, in full or at least partially, about what additional discovery (and from what sources) should be provided by Defendants to Plaintiffs. In doing so, I suggested that they consider "phased discovery," so that the most promising, but least burdensome or expensive sources of information could be produced initially, which would enable Plaintiffs to reevaluate their needs depending on the information already provided.

Finally, I advised counsel that when they had completed their discussion, they were to provide me with a status report identifying any unresolved issues, and if there were any, I gave them a format to use to present them to me in a fashion that would enable me to rule on them expeditiously.

It is apparent that the process outlined above requires that counsel cooperate and communicate, and I note that had these steps been taken by counsel at the start of discovery, most, if not all, of the disputes could have been resolved without involving the court. It also is apparent that there is nothing at all about the cooperation needed to evaluate the discovery outlined above that requires the parties to abandon meritorious arguments they may have, or even to commit to resolving all disagreements on their own. Further, it is in the interests of each of the parties to engage in this process cooperatively. For the Defendants, doing so will almost certainly result in having to produce less discovery, at lower cost. For the Plaintiffs, cooperation will almost certainly result in getting helpful information more quickly, and both Plaintiffs and Defendants are better off if they can avoid the costs associated with the voluminous filings submitted to the court in connection with this dispute. Finally, it is obvious that if undertaken in the spirit required by the discovery rules, particularly Rules 26(b)(2)(C) and 26(g), the adversary system will be fully engaged, as counsel will be able to advocate their clients' positions as relevant to the factors the rules establish, and if unable to reach a full agreement, will be able to bring their dispute back to the court for a prompt resolution. In fact, the cooperation that is necessary for this process to take place enhances the legitimate goals of the adversary system, by facilitating discovery of the facts needed to support the claims and defenses that have been raised, at a lesser cost, and expediting the time when the case may be resolved on its merits, or settled. This clearly is advantageous to both Plaintiffs and Defendants.

D.Md.,2008. Mancia v. Mayflower Textile Servs. Co. 253 F.R.D. 354

END OF DOCUMENT



248 F.R.D. 182

(Cite as: 248 F.R.D. 182)

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United States District Court, E.D. Pennsylvania. GMAC BANK, Plaintiff, v.

HTFC CORP., Defendant.

Civil Action No. 06-5291. Feb. 29, 2008.

Background: Bank which administers residential mortgage loans brought suit against seller of residential mortgage loans claiming that it breached a contract by selling it loans that were improperly underwritten and not investment quality, and by refusing to repurchase the deficient loans, as required by the contract. Defendant asserted counterclaim for tortious interference with contract. Plaintiff filed motion to compel deposition testimony and for sanctions.

Holdings: The District Court, Eduardo C. Robreno, J., held that:

- (1) defendant's continual failure to answer questions at his deposition and his giving evasive and non-responsive answers when he did answer warranted grant of plaintiff's motion to compel;
- (2) defendant's unjustified failure to answer questions propounded at his deposition warranted sanction of ordering him to pay plaintiff the sum of \$13,026.00 in fees and expenses incurred by plaintiff in connection with its motion to compel; and
- (3) defendant's willful and bad faith frustration of a fair examination warranted further sanction of imposing costs incurred by plaintiff in connection with his deposition in the amount of \$3,685.66, plus 75% of the attorney fees incurred in connection with the deposition in the amount of \$12,610.95, for a total sanction of \$16,296.61.

Motion granted.

West Headnotes

[1] Federal Civil Procedure 170A \$\infty\$1452

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others Pending Action

170AX(C)6 Failure to Appear or Testify;

Sanctions

170Ak1452 k. Order Compelling Answer.

Most Cited Cases

Defendant's continual failure to answer questions at his deposition and his giving evasive and non-responsive answers when he did answer warranted grant of plaintiff's motion to compel defendant's deposition testimony. Fed.Rules Civ.Proc.Rule 37(a)(3)(B)(i), 28 U.S.C.A.

[2] Federal Civil Procedure 170A \$\infty\$ 1453

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others Pending Action

170AX(C)6 Failure to Appear or Testify;

Sanctions

170Ak1453 k. Payment of Expenses. Most

Cited Cases

Defendant's unjustified failure to answer questions propounded at his deposition warranted sanction of ordering him to pay plaintiff the sum of \$13,026.00 in fees and expenses incurred by plaintiff in connection with its motion to compel defendant's deposition testimony. Fed.Rules Civ.Proc.Rule 37(a)(5)(A), 28 U.S.C.A.

[3] Federal Civil Procedure 170A \$\infty\$ 1453

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others Pending Action

170AX(C)6 Failure to Appear or Testify;

Sanctions

170Ak1453 k. Payment of Expenses. Most

Cited Cases

Where approximately 75% of the time plaintiff

spent deposing defendant was time wasted because of defendant's willful and bad faith frustration of a fair examination, sanction would be imposed on defendant consisting of the costs incurred in connection with his deposition in the amount of \$3,685.66, plus 75% of the attorney fees incurred in connection with the deposition in the amount of \$12,610.95, for a total sanction of \$16,296.61. Fed.Rules Civ.Proc.Rule 30(d)(2), 28 U.S.C.A.

[4] Federal Civil Procedure 170A \$\infty\$ 1453

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others Pending Action

170AX(C)6 Failure to Appear or Testify;

Sanctions

170Ak1453 k. Payment of Expenses. Most

Cited Cases

As sanction for his endorsement and ratification of defendant's misconduct at deposition, defendant's attorney would be ordered to pay plaintiff, jointly and severally with defendant, \$13,026 in attorney fees and expenses the plaintiff incurred in connection with its motion to compel defendant's deposition testimony. Fed.Rules Civ.Proc.Rule 37(a)(3)(B)(i), (a)(4), (a)(5)(A), 28 U.S.C.A.

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others Pending Action

170AX(C)6 Failure to Appear or Testify;

Sanctions

170Ak1453 k. Payment of Expenses. Most

Cited Cases

Where inaction of defendant's attorney in face of defendant's gross misconduct at his deposition impeded, delayed, and contributed to total frustration of the deposition, defendant's attorney would be ordered as sanction to pay plaintiff, jointly and severally with defendant, the \$16,296.61 in costs and fees incurred by plaintiff in connection with the deposition. Fed.Rules Civ.Proc.Rule 30(d)(2), 28 U.S.C.A.

*183 Robert B. Bodzin, Melissa Canfield Prince, Kleinbard Bell & Brecker LLP, Philadelphia, PA, for Plaintiff.

Joseph R. Ziccardi, Chicago, IL, Daniel Strick, Lucas & Cavalier, LLC, Philadelphia, PA, for Defendant.

MEMORANDUM

EDUARDO C. ROBRENO, District Judge.

[5] Federal Civil Procedure 170A \$\infty\$ 1453

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*184 I. INTRODUCTION

The issue of how to rein in incivility by counsel in depositions has been the subject of considerable interest in the legal profession for some time. Less discussed, perhaps because it is less frequent, but nevertheless just as pernicious, is what to do about uncivil conduct by a witness at a deposition. An important corollary to the issue is what is the duty of counsel who is confronted by uncivil conduct by his own witness.

The spectacular failure of the deposition process in this case occurred during two deposition sessions in the course of a commercial dispute. The deponent, Aaron Wider, is the owner and chief executive officer of Defendant HTFC Corp.

Before the Court are a motion to compel and for sanctions filed by Plaintiff GMAC Bank and a rule to show cause issued by the Court upon counsel for HTFC and Wider, Joseph Ziccardi, Esq., why sanctions should not be imposed upon counsel. A hearing was held on

December 20, 2007, and the parties submitted supplemental briefing thereafter. For the reasons that follow, the motion to compel will be granted, and Wider and Ziccardi will be sanctioned.

II. BACKGROUND

Plaintiff GMAC Bank administers residential mortgage loans, and Defendant HTFC Corp. takes loan applications and sells residential mortgage loans to lenders, such as GMAC. GMAC and HTFC entered into a contract for the sale of certain loans. GMAC claims that HTFC breached the contract by selling it certain loans that were improperly underwritten and not investment quality, and refusing to repurchase them, as required by the contract. HTFC, in turn, asserts a counterclaim for tortious interference with contract based on GMAC's allegedly improper administration of certain loans to HTFC's clients.

On September 26 and November 8, 2007, GMAC sought to take the deposition of Aaron Wider, owner and chief executive officer of HTFC. According to

GMAC, due to Wider's abusive conduct toward counsel, obstruction and delay of the deposition proceedings, and failure to answer and evasive responses to questions propounded at the deposition, GMAC was unable to complete the deposition. GMAC brings the instant motion to compel Wider's deposition and for sanctions.

III. MOTION TO COMPEL AND FOR SANCTIONS AGAINST WIDER

A. Legal Standard

Federal Rule of Civil Procedure 30 governs depositions by oral examination. Rule 30 sets forth a detailed protocol governing the conduct of parties, counsel, and deponents at depositions. The rule provides that "examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence." Fed.R.Civ.P. 30(c)(1). The rule permits objections by counsel: "An objection, at the time of the examination ... must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection." Fed.R.Civ.P. 30(c)(2).

FN1. The Federal Rules of Civil Procedure were amended, effective December 1, 2007. See United States Courts: Federal Rulemaking, http://www.uscourts.gov/rules/index 2. html (last accessed Feb. 28, 2008). The misconduct at issue here occurred before the effective date of the amended rules. As relevant here, however, the amendment to the rules is limited to the restyling and renumbering of certain rules. Therefore, the Court will cite to the amended rules.

If "a deponent fails to answer a question asked under Rule 30," or provides an answer that is "evasive or incomplete," then a motion to compel the deposition testimony may be filed. Fed.R.Civ.P. 37(a)(3)(B)(i), (a)(4). "If the motion is granted ... the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed.R.Civ.P.

37(a)(5)(A).

*185 If a person's conduct is so egregious that it "impedes, delays, or frustrates the fair examination of the deponent," FN2 the Court may impose an additional "appropriate sanction" on that person, FN3 "including the reasonable expenses and attorney's fees incurred by any party." FN4 Fed.R.Civ.P. 30 (d)(2).

FN2. Although a deponent's conduct in frustrating a deposition can be the functional equivalent of "failure to appear" at a deposition, courts have been reluctant to impose sanctions on that basis. See Estrada v. Rowland, 69 F.3d 405, 406 (9th Cir.1995) ("Estrada attended his deposition but refused to testify. This is not a 'failure to appear' for the purposes of Rule 37(d)."); accord R.W. Int'l Corp. v. Welch Foods, Inc., 937 F.2d 11, 15 n. 2 (1st Cir.1991); SEC v. Research Automation Corp., 521 F.2d 585, 589 (2d Cir.1975); Stevens v. Greyhound Lines, Inc., 710 F.2d 1224, 1228 (7th Cir.1983); Aziz v. Wright, 34 F.3d 587, 589 (8th Cir.1994).

FN3. A "person" includes " 'the deponent, any party, or any other person involved in the deposition.' " *In re BWP Gas, LLC,* 2006 WL 2883012, at *1 (Bankr.E.D.Pa. June 13, 2006) (quoting Fed.R.Civ.P. 30 advisory committee's notes).

FN4. The text of Rule 30(d)(2) does not define "appropriate sanction" or "reasonable expenses and attorney's fees." Courts have used their discretion to fashion a variety of remedies. See, e.g., Biovail Labs., Inc. v. Anchen Pharms., Inc., 233 F.R.D. 648, 654 (C.D.Cal.2006) (requiring payment of costs and attorney's fees incurred "in preparing this discovery motion, as well as ... costs incurred in the first deposition" and also "costs attendant to resetting Dr. Seth's deposition, including travel costs for defendant's counsel"); Plump v. Kraft Foods N. Am., Inc., No. 02-7754, 2003 WL 23019166, at *1 (N.D.III.Dec.23, 2003) (requiring plaintiff to

"pay the costs and fees incurred by defendant ... in preparing, filing and arguing [the] Motion for Sanctions ... and in taking the second session of [plaintiff's] deposition"); *Morales v. Zondo, Inc.*, 204 F.R.D. 50, 57-58 (S.D.N.Y.2001) (requiring payment of "the transcript cost of [the] deposition," "[counsel]'s normal hourly rate multiplied by the number of hours during which he questioned [the deponent]," and "\$1,500 to the Clerk of the Court.").

B. Discussion

More than 98% of all civil cases filed in the federal courts result in disposition by way of settlement or pretrial adjudication. Very often, these results turn on evidence obtained during depositions. Thus, depositions play an extremely important role in the American system of justice.

FN5. See Admin. Office of the U.S. Courts, Judicial Business of the United States Courts: 2006, Table C-4A (stating that only 1.3% of all civil cases in U.S. district courts reached trial in 2006), http:// www. uscourts. gov/ judbus 2006/ appendices/ c 4 a. pdf.

Although the Federal Rules of Civil Procedure inform the procedures to be followed and the duties and rights of parties, witnesses, and counsel during and in connection with depositions, the rules are largely self-executing. Depositions usually occur at a lawyer's office, outside the view of the public and without judicial supervision. Although, in appearance, more informal than a court proceeding, they are an integral part of the Court's procedures and the staple of modern litigation. For the process to succeed, it is essential that the parties, attorneys, and witnesses participating in depositions conduct themselves with civility and decency.

Because few depositions warrant sanctions more than this one, Wider's conduct merits an extended discussion. FN6 The Court has reviewed in detail the transcript and video recordings of the two-day deposition of Wider, FN7 and summarizes its findings below. FN8

FN6. HTFC, defense counsel, and Wider have

received ample notice and opportunities to be heard concerning the possible imposition of sanctions. Specific notice of the sanctions being considered was first given at a telephone discovery conference on December 7, 2007. Notice was again provided in subsequent orders of the Court (doc. nos. 40, 41). On December 21, 2007, an in-person hearing on the motion to compel and for sanctions and the rule to show cause was held, with Wider in attendance, where both parties were invited to offer evidence and present oral argument. At the hearing, the Court again put HTFC, defense counsel, and Wider on notice of the specific sanctions being considered. Thereafter, the parties were afforded the opportunity to submit supplemental briefing. See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 278 F.3d 175, 191 (3d Cir.2002) (holding that due process "will usually require notice of the precise sanctioning tool that the court intends to employ").

FN7. Copies of the transcript and the video recording will be filed of record.

FN8. This opinion quotes many of Wider's uncensored remarks. While the use of profanity in the opinion is distasteful, it is necessary in order to capture the nature of the offensive conduct displayed by the deponent. See, e.g., Saldana v. Kmart Corp., 260 F.3d 228, 235-38 (3d Cir.2001) (repeatedly quoting, without censoring, the word "fuck" where the severity of such language was relevant to motion for sanctions); McColm v. S.F. Hous. Auth., No. 02-5810, 2006 WL 3591208, at *1 (N.D.Cal. Dec.11, 2006); Lynn v. Roberts, No. 03-3464, 2005 WL 3087841, at *6 & n. 36 (D.Kan. Nov.1, 2005).

*186 1. Summary of Wider's conduct

Wider's assault on the deposition proceedings involved three types of inappropriate behavior: 1) engaging in hostile, uncivil, and vulgar conduct; 2) impeding, delaying, and frustrating fair examination; and 3)

failing to answer and providing intentionally evasive answers to deposition questions. Multiple examples of each are provided below.

a. Hostile, uncivil, and vulgar conduct

Throughout his deposition, Wider sought to intimidate opposing counsel by maintaining a persistently hostile demeanor, employing uncivil insults, and using profuse vulgarity.

- Q. [T]his is your loan file, what do Mr. and Mrs. Fitzgerald do for a living?
- A. I don't know. Open it up and find it.
- Q. Look at your loan file and tell me.
- A. Open it up and find it. I'm not your fucking bitch.
- Q. Take a look at your loan application.
- A. Do it yourself. Do it yourself. You want to do this in front of a judge. Would you prefer to [do] this in front of a judge? Then, shut the fuck up.
- Q. Sir, take a look-
- A. I'm taking a break. Fuck him. You open up the document. You want me to look at something, you get the document out. Earn your fucking money asshole. Isn't the law wonderful. Better get used to it. You'll retire when I'm done.

Wider Dep., Nov. 8, 2007, at 418:25-419:17.

- Q. And you have a hard time comprehending. We're going to adjourn this deposition if this happens again because you are offending every single person.
- A. Don't speak for anybody in here except yourself fuck face.
- Q. I'm speaking for myself and I'm speaking for the Court Reporter.
- A. If she had a problem with me she would say something. She knows it's [not] directed toward her. It's directed to you because you're a piece of shit and a piece of garbage and I'm the only person in your life

that is fucking up your world and I enjoy it. I enjoy it and when you sit there and say I'm perpetrating a fraud I'm just better at the law than you are and you can't get in the fucking door and it's pissing you off. Keep trying.

Id. at 433:19-434:11.

- Q. Have you spoken to Mr. Petinton about the subpoena he received for documents?
- A. He mentioned [it] to me. He laughed at you.
- Q. What did he say?
- A. He thought you were a joke.
- Q. What else did he say?
- A. That you're a joke.
- Q. Did he say he had documents responsive to the subpoena?
- A. He had no documents. He doesn't discuss things with me. He just said you're a joke.
- Q. That's what he said?
- A. Yes.
- Q. So he shares your opinion on these things as well?
- A. Yes, you're a joke.

Id. at 437:24-438:15.

- Q. Do you know-
- A. No, I don't know. Be specific.
- MR. ZICCARDI: Let him finish the question.
- Q. Sir, if you can't be a little more civil-
- A. I am very civil.
- Q. -in how you respond to my questions-
- A. I am very civil.
- Q. What we can do is we can have this deposition in

front of a judge.

A. We can do that.

Q. And the judge can-

A. Let's do that.

Q. No, no. We're not going to-

*187 A. Let's do that; this way he can rip your ass out.

Q. We're not going to do that, sir, okay.

A. Then don't fuckin' threaten me, asshole.

Q. Well, sir, I would appreciate it if you would control your language in light of the people that are present in the room and I would appreciate it if you would be a little more courteous, okay.

A. I'm very courteous.

Q. Okay. Now-

A. Let's go in front of a judge and shut up.

O. Sir-

A. Shut your mouth.

Wider Dep., Sept. 26, 2007, 28:7-29:15.

The above are only a few examples of Wider's hostile, uncivil, and vulgar conduct, which persisted throughout the nearly 12 hours of deposition testimony. In fact, Wider used the word "fuck" and variants thereof no less than 73 times. To put this in perspective-in this commercial case, where GMAC's claim is for breach of contract and HTFC's counterclaim is for tortious interference with contract-the word "contract" and variants thereof were used only 14 times. Such profuse vulgarity had no constructive purpose. The Court is left with the impression that such abusive language was chosen solely to intimidate and demean opposing counsel.

FN9. In *Saldana*, the Third Circuit reversed the district court's order imposing sanctions on an

attorney pursuant to its inherent power for "a handful of uses" of the word "fuck." 260 F.3d at 238. Saldana is distinguishable from this case in several respects. First, the abusive language in Saldana did not occur in the presence of the Court or in an ancillary proceeding such as a deposition, but rather during telephone conversations between attorneys. Second, far from a "handful" of vulgar words, Wider filled numerous pages of the deposition transcript with vulgarity and insult. Finally, the Court does not employ its inherent powers in this case, as the Federal Rules of Civil Procedure provide the authority to impose sanctions. See Prudential, 278 F.3d at 189 ("[G]enerally, a court's inherent power should be reserved for those cases in which the conduct of a party or an attorney is egregious and no other basis for sanctions exists." (quotation omitted)).

This impression is confirmed by Wider's repeated references to himself as "the professor" and a "doctor of law," and repeated expressions of his belief that counsel for GMAC is a "joke" and a "fucking idiot." *See* Wider Dep., Nov. 8, 2007, 437:24-438:15; Wider Dep., Sept. 26, 2007, at 65:15-66:7. Additionally, although GMAC's counsel consistently and respectfully addressed the deponent as "Mr. Wider," the deponent repeatedly and patronizingly addressed GMAC's counsel by his first name. *See*, *e.g.*, Wider Dep., Sept. 26, 2007, at 366:8-20.

b. Impeding, delaying, and frustrating fair examination

Equally serious is Wider's willful exploitation of the discovery process. Wider impeded the deposition by improperly interposing his own objections, delayed the proceedings by providing unnecessarily protracted answers and repeatedly interrupting counsel for GMAC's questioning, and proudly expressed his intent to frustrate his examination.

Q. Are you done?

A. No, I'm not. I'm going to keep going. I'll have you flying in and out of New York City every single month and this will go on for years. And, by the way,

along the way GMAC will be bankrupt along the way and I will laugh at you.

Wider Dep., Nov. 8, 2007, at 434:12-17.

- Q. Well, do you know the purpose for these transactions?
- A. Why the fuck would I know that?
- Q. I'm just asking you whether you know.
- A. Why the fuck would I know that?
- Q. I'm asking whether or not you know that.
- A. It's got nothing to do with the transaction. Don't ask stupid questions. Ask smart questions.
- Q. So if Mr. Petinton were to say that he knew the purpose of these transactions that you knew-
- A. It doesn't make a difference.
- Q. -he'd be lying?
- *188 A. I don't give a flying fuck what he's lying about. It has no bearing. Stick to the here and now; you'll get out of here quicker because I'll take months. You'll be back and forth. I'll make your life miserable. Trust me. You'll be drinking breakfast, lunch, and dinner every day. Start asking some real questions.
- Q. All right. So this-
- A. You want to know what color I wipe my ass with? I swear to you, my four-year-old knows more than you.

Wider Dep., Sept. 26, 2007, at 251:6-252:11.

- Q. My question is-
- A. My question is go in front of a judge and stop threatening me.
- Q. I'm not threatening you, sir.
- A. Then shut up.

- Q. What I'm telling you is that if you can't-
- A. I can. If you don't like my response-
- Q. No, no, sir.
- A. -then note that I'm refusing to answer it.
- O. Sir.
- A. Deal with it because this is how it's going to be like clock work.
- Q. All right, sir.
- A. And I'll tell you what uncivil and what uncourteous is. Telling you to go fuck yourself is uncivil. If you ask a question, I'm going to give you a response. If you pry into my father's death, I'm going to give you a response. If you fuck with my mental illness, I'm going to give you a response. And if you threaten to put me in front of a judge, let's do it. I got all the time in the day, all the time in the day, and the judge will restrain you.
- Q. Are you done, sir?
- A. No, I'm not. We're just beginning.

Id. at 28:18-30:25.

Wider accomplished his dilatory purpose in part by abruptly storming out of the deposition on several occasions and repeatedly forcing counsel to take breaks.

- Q. Well, I will represent to you he did and that I served Mr. Finger with a subpoena for all of the records of the closings on those loans, including the records of payments and disbursements.
- A. And you're shooting blanks.
- Q. Are you very pleased with yourself, sir?
- A. Yes, I am.
- Q. Because you're trying to perpetrate a fraud and hide it?

- A. Go fuck yourself, Bob. Now, you're going to have to wait.
- Q. Sir, if you keep walking out-
- A. Shut the fuck up.
- Q. Here we go again.
- A. I have a business to run.
- Q. You don't have a business to run. You have a deposition.
- A. Shut the fuck up. Don't tell me what to do. You sit there. You're on the payroll. You can sit there and juice your client; you're not juicing me. [Wider leaves the room.]

Wider Dep., Nov. 8, 2007, 432:6-433:1.

- Q. You need to tell me-
- A. Your representation of your company willfully went out and tried to fuck up my life. You don't need to know anything about this company.

MR. ZICCARDI: Let's take a break.

MR. BODZIN [counsel for GMAC]: We can take a break but we're not going to do this over and over again. If Mr. Wider simply does not want to answer questions or answers questions in this manner we're not going to have a conference every time it happens. Hopefully, you will be able to speak with him and persuade him that's not an appropriate response to my questions.

THE WITNESS: We're having a conference tomorrow, Bob. Why don't you get a motion from the Judge because he's going to give you an ass licking.

Id. at 362:15-363:8.

In addition to exploiting the deposition process with the apparent purpose of increasing the financial burden on GMAC, Wider repeatedly violated the procedural *189 rules governing the deposition. Instead of allowing his counsel to make objections, Wider regu-

larly interposed his own objections. Further, even in the absence of any objection from counsel or instruction not to answer, Wider improperly refused to answer questions.

- Q. Going back to the deed between yourself and the Sacaro Trust on April 29, 2005, what was the purpose of that transaction?
- A. That's confidential. You know the laws of Trusts.
- Q. It's not confidential.
- A. Yes, it is.
- Q. What was the purpose of that transaction?
- A. None of your business. That's the law.
- Q. What is the Sacaro Trust?
- A. None of your business. Not even a Judge could get me to enforce that.

Id. at 405:19-406:6.

- Q. What was the purpose-
- A. None of your-
- Q. -for buying a property for \$525,000 and on the same day, conveying it to a trust, and then conveying it back to you for \$1,150,000?
- A. None of your business.
- Q. No, [it] is my business.
- A. It's none of you[r] business. This is the law. Look it up.
- Q. My question is what is your purpose?
- A. I'm answering your question, okay. I'm a doctor of law. I'm not here to teach you. You come to my university, you pay for it. It's on a need-to-know basis. You don't need to know.

Wider Dep., Sept. 26, 2007, at 65:15-66:7.

The video recording of the deposition reveals further indicia of Wider's intent to exploit and protract his deposition. At multiple points during the deposition, Wider would follow his inappropriate, obstructive, or dilatory remarks with a gleeful smirk directed at his counsel, at the transcriptionist, and even directly at the camera. *See*, *e.g.*, Wider Dep. Video, Nov. 11, 2007, at 10:38:00-:30; Wider Dep. Video, Sept. 26, 2007, at 10:45:00-:30, 15:27:00-: 30. In fact, after a particularly odious instance of obstruction, Wider would even pat himself on the back, flaunting his exploitation of the deposition process, and asking, "Isn't the law wonderful?" *See*, *e.g.*, Wider Dep., Nov. 8, 2007, at 418:25-419:17.

c. Failure to answer and intentionally evasive answers

Wider often refused to answer questions, and, when he did answer questions, provided intentionally uncooperative and long-winded answers to straightforward questions.

- Q. My question is where are you currently employed?
- A. I'm not. I just told [you] I work for free.
- Q. Okay. You're not employed by HTFC Corporation?
- A. No, I own HTFC Corporation. Be specific.
- Q. Okay. And what do the initials HTFC mean?
- A. Hit That Fuckin' Clown. That's what it means. It's an acronym.

Wider Dep., Sept. 26, 2007, at 16:14-25.

- Q. Did you ever reside at 1004 Broadway?
- A. Can't recall.
- Q. You don't know where you lived?
- A. No, I don't.
- Q. You don't know where you lived?
- A. According to you, I've got psychiatric issues. So I can't recall. You remember that.

- Q. Sir, this is November of 2007.
- A. That's right.
- Q. You don't recall where you lived between 2005 and 2006?
- A. Well, according to you I've got psychiatric issues since the last deposition. No, I-
- Q. So you don't recall where you lived.

Wider Dep., Nov. 8, 2007, at 407:20-408:10.

- Q. Is it just a coincidence Mr. Petinton was involved as the Trustee in connection with both of those Trusts?
- *190 A. It's not a coincidence that I'm a genius at what I do. I obey the law and live the law. You practice the law. Sir, I'm not going to be interrupted while I am speaking. I live the law. You serve the law. You practice the law. I abide by the law and enforce the law to the fullest extent the law allows. The only difference between you and I is I have a pair of balls and you don't. The only difference between the average person [and me] is I have a pair of balls and they don't. You think it's funny. I'm not the one chasing \$15 million ass wipe.

Id. at 428:3-18.

- Q. Sir, during the time period of January 2006 through March 2007, can you identify any specific loans that you wanted to sell into the marketplace that you were unable to sell?
- A. Hundreds. [I] can identify hundreds.
- Q. Identify those loans for me.
- A. I don't carry them in my head, Bob.
- Q. Where is the information that would describe these loans?
- A. Can you spell your name backwards, Bob? That's what you're asking. Everything is done electronically. Everything's in the files. Can you spell your name backwards, Bob? Tell me.

Wider Dep., Sept. 26, 2007, at 366:8-20.

- Q. Do you know who-and, again, you'll see on the fourth page that there is a direction that the Deed be returned by mail to GCF Development, do you know why?
- A. Yes, we're testing Carlton Cheats's program.
- Q. I'm sorry?
- A. I am testing Carlton Cheats' program on TV.
- Q. Who is Carlton Cheats program?
- A. You don't watch Carlton Cheats on TV? Buy a house. Rehab a house. I suggest you watch TV. I answered your question.
- Q. Why is the direction this deed be returned to GCF Development testing Carlton Cheats's program?
- A. Go watch the program and find out. I'm not here to educate you, Bob.
- Q. You don't have an answer to that either?
- A. I just answered you. You don't like the answer. You might not be able to manipulate me to get an answer but when I tell [you] that's my answer you fucking accept it or don't.

Wider Dep., Nov. 8, 2007, at 413:14-414:12.

- Q. Sir, were you involved in flipping that property?
- A. You tell me.
- Q. Sir, I'm going to ask the questions. You're going to answer the question.
- A. I just responded with a question.
- Q. Were you involved in flipping the property at 207 North Rutherford?
- A. You tell me. And you provide that evidence to the court.
- Q. It doesn't work that way, sir.

- A. Yes, it does. That's my answer. Listen, we can go around in circles and you'll end up with the same answer. You tell me. You're that good. You're hired by GMAC.
- Q. Sir, my question is, and I expect an answer.
- A. I can't recall.
- Q. Were you involved in flipping 207 North Rutherford?
- A. I can't recall. I'm involved in flipping you.

Wider Dep., Sept. 26, 2007, 253:12-254:11.

2. HTFC's defenses of Wider's conduct

Although conceding that Wider's conduct at his deposition was crude and vulgar, HTFC advances several arguments in an attempt to justify Wider's conduct.

a. Relevance

HTFC argues that Wider's refusal to respond to questions during his deposition was justified because many of GMAC's questions were irrelevant. HTFC is incorrect. Federal Rule of Civil Procedure 30(c)(2) provides that a deponent must answer all deposition questions-notwithstanding counsel's objections-unless counsel expressly instructs the *191 deponent not to answer or moves to suspend the deposition. In fact, Wider was expressly advised of this rule by GMAC's counsel, but continued to be recalcitrant and nonresponsive. See Wider Dep., Nov. 8, 2007, at 12:20 ("If your counsel has objections to my questions, your counsel can raise objections. In the absence of an objection or instruction from your counsel, you have to answer my questions; do you understand that?").

If counsel for a deponent believes that a question is improper, the Federal Rules give him three choices: 1) he may object to the question and allow the deposition to proceed while preserving the objection, *see* Fed.R.Civ.P. 30(c)(2); 2) he may instruct the witness not to answer, generally to preserve a privilege or enforce a court-ordered limitation, *see id.*; or 3) he may suspend the proceedings and bring a motion to terminate or limit the deposition if it is being conducted in

bad faith or in order to unreasonably annoy, embarrass, or oppress the deponent or a party, *see* Fed.R.Civ.P. 30(d)(3)(A).

FN10. The rule speaks in absolute terms, permitting counsel to instruct the witness not to answer "only" to "preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)." Fed.R.Civ.P. 30(c)(2). As a practical matter, some courts have interpreted the rule to provide greater flexibility. Compare Hall v. Clifton Precision, 150 F.R.D. 525, 531 (E.D.Pa.1993) ("Counsel shall not direct or request a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court."), with Prudential-LMI Commercial Ins. Co. v. Windmere Corp., No. 94-0197, 1995 WL 37635, at *2 (E.D.Pa. Jan.23, 1995) (certain courts "take the view that a deponent need not answer if the objection is that the question is irrelevant, argumentative, or misleading"). See generally Acri v. Golden Triangle Mgmt. Acceptance Co., No. 93-12188, 142 Pitt. L.J. 225 (Com.Pl.1994) (comparing the two approaches).

The rules do not permit a deponent to interpose objections himself. They do not permit evasive or uncooperative answers merely because a deponent is dissatisfied with a question. And they certainly do not permit intentionally prolonging a deposition to further burden the litigation.

b. Confidentiality

HTFC similarly argues that Wider refused to respond to certain questions because they sought confidential information. Defense counsel, however, only objected on confidentiality grounds on a few occasions; on most occasions, Wider directly and improperly made an objection himself, and when pressed, simply refused to answer the question. Moreover, HTFC did not seek a protective order prior to Wider's deposition. In fact, HTFC did not file a motion for protective order until nearly

a month after Wider's deposition was completed. FN11

FN11. Rule 26(c) provides, in pertinent part:

A party or any person from whom discovery is sought may move for a protective order ... on matters relating to a deposition, in the court for the district where the deposition will be taken.... The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ... [an order] requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.

Fed.R.Civ.P. 26(c)(1)(G). Therefore, the proper course of conduct for HTFC would have been to, *before* the deposition began, obtain a protective order from the Court. *See id.* Failing that, HTFC could have adjourned the deposition and sought a protective order from the Court. *See* Fed.R.Civ.P. 30(d)(3)(A). The rule does not permit HTFC to proceed with the doomed deposition, knowing that Wider will refuse to answer questions based on the purported confidentiality of the information sought.

c. Provocation

HTFC next argues that Wider's abusive and obstructive conduct is justified because he was merely reacting to deposing counsel's provocative and accusatory questions. This argument is simply astonishing. As evidenced in the video recording of the deposition, counsel for GMAC comported himself with courtesy, respect, and professionalism; this was no easy feat, considering Wider's unrelenting insults, vulgarity, and mockery, most of which were a direct assault on counsel for GMAC.

Far from provocative, counsel for GMAC asked relevant questions of the type seen in the ordinary course of a deposition in a commercial case. It was Wider who

gave the *192 provocative responses. For instance, when deposing counsel asked Wider to look at his loan file, Wider responded, "Open it up and find it. I'm not your fucking bitch." When the request was renewed, Wider responded by telling counsel to "shut the fuck up." Wider Dep., Nov. 8, 2007, at 418:25-419:17. Subsequently, when counsel for GMAC represented that he had served a third party with a subpoena for certain records, Wider responded: "And you're shooting blanks." *Id.* at 432:6-433:1. Finally, Wider referred to counsel for GMAC as a "clown" throughout the deposition, and when asked what the initials HTFC mean, Wider responded: "Hit That Fuckin' Clown." Wider Dep., Sept. 26, 2007, at 16:14-25.

Counsel for GMAC exercised great restraint in the face of Wider's persistent attempts to incite him to anger. In short, deposing counsel could not have been less provocative. Thus, the purported "provocation" of Wider cannot justify his abusive, obstructive, and evasive conduct.

d. Mental condition

Finally, HTFC argues that Wider's conduct at his deposition is explained by a mental condition, which should be considered as a mitigating factor in imposing any sanctions.

At the hearing on the instant motion, both Wider and his treating physician, Dr. Oscar Calderon, were present. Although the Court afforded Wider the opportunity to present testimony under oath, no witnesses were called. After the hearing, HTFC requested that it be able to submit an affidavit from Dr. Calderon under seal. The Court granted the request, but specifically advised HTFC in the order of December 21, 2007, that it would not consider the affidavit *ex parte*, but rather that "Plaintiff is entitled to discovery of the subject matter of the medical records in connection with the pending motion to compel and for sanctions." Disregarding the Court's order, HTFC filed the affidavit under seal but never served a copy upon opposing counsel. Accordingly, the Court will not consider the affidavit of Dr. Calderon.

FN12. During the hearing, defense counsel pur-

ported to offer an apology to the Court and opposing counsel on Wider's behalf. Tellingly, although he was present at the hearing and was afforded the opportunity to address the Court, Wider himself remained silent throughout the proceedings.

Moreover, Wider's argument that his alleged mental condition mitigates his sanctionable conduct has no merit. Within the first few minutes of the deposition, counsel for GMAC inquired as to Wider's mental condition, and Wider replied that he suffers from an "anxiety disorder." Wider also indicated, however, that he had taken his medication the day of the deposition, as he has every day for ten years, and is accustomed to the medication. Before questioning commenced, the following exchange took place:

Q. Well, are you feeling any adverse [e]ffects [from your] medication right now?

A. Not right now, no.

Q. All right. If at any time during the deposition you are feeling adverse [e]ffects of the medication, will you let me know that?

A. Yes.

Wider Dep., Sept. 26, 2007, 9:6-9:16. Therefore, Wider and his counsel were well aware of their ability to stop the deposition whenever Wider felt any adverse effects from his medication. Nonetheless, during the nearly 12 hours of deposition testimony-which was pervaded by Wider's abusive, obstructive, and evasive conduct-Wider reported an adverse effect from his medication on only two occasions.

FN13. On both occasions, counsel for GMAC immediately agreed to adjourn the deposition until Wider had recovered. *See* Wider Dep., Sept. 26, 2007, at 13:2, 71:8. On the first occasion, Wider became angry and left the room, leading to a five-minute recess. On the second occasion, Wider reported blurred vision, and counsel for GMAC agreed to adjourn until Wider regained his vision, and a ten-minute re-

cess was taken.

On other occasions, Wider used his mental illness as a dubious defense to avoid answering questions. For example, when asked where he lived during 2005 and 2006, Wider responded: "According to you, I've got psychiatric issues. So I can't recall. You remember that." Wider Dep., Nov. 8, 2007, at 407:20-408:10. Wider also gave deposing *193 counsel reason to doubt the sincerity of his claim of mental illness, stating at one point that he was not receiving psychiatric treatment and "just ha[s] anxiety"; in fact, when asked whether he had ever been diagnosed as being paranoid or schizophrenic, Wider replied, "Not at all. I'm a genius." Wider Dep., Sept. 26, 2007, at 91:8-16. Whatever truth there may be to Wider's claim of anxiety and mental instability, it does not justify or mitigate his abusive, obstructive, and evasive behavior.

3. Motion to compel and for sanctions

In light of the overwhelming evidence that Wider's conduct at his deposition violated Federal Rules of Civil Procedure 37(a)(3)(B)(i) and 30(d)(2), the motion to compel will be granted and sanctions will be imposed upon Wider.

a. Violation of Rule 37(a)(3)(B)(i)

[1] As explained above, a party seeking discovery may "move for an order compelling an answer" if "a deponent fails to answer a question" asked during a deposition. Fed.R.Civ.P. 37(a)(3)(B)(i); see also Fed.R.Civ.P. 37(a)(4) (providing that "an evasive or incomplete ... answer ... must be treated as a failure to ... answer"). The record reveals that Wider continually failed to answer questions propounded at his deposition. When Wider did answer questions, his answers were evasive and non-responsive. This is a clear violation of Rule 37(a)(3)(B)(i), and thus GMAC's motion to compel will be granted. Accordingly, Wider's deposition will be taken in Philadelphia, PA, under the supervision of a magistrate judge.

[2] Because the motion to compel will be granted, the Court must determine whether sanctions are appropriate under Rule 37(a)(5)(A) ("If the motion [to compel] is granted ... the court must ... require the ... depon-

ent whose conduct necessitated the motion ... to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees."). Sanctions under Rule 37(a)(5)(A) have a compensatory purpose. See Hutto v. Finney, 437 U.S. 678, 690 n. 14, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) ("The award ... makes the prevailing party whole for expenses caused by his opponent's obstinacy."). Sanctions are not appropriate, however, if "the movant filed the motion before attempting in good faith to obtain the ... discovery without court action," "the opposing party's nondisclosure ... was substantially justified," or "other circumstances make an award of expenses unjust." Fed.R.Civ.P. 37(a)(5)(A)(i)-(iii).

Here, Wider's failure to answer questions propounded at his deposition was not justified. Moreover, GMAC attempted in good faith over the course of nearly 12 hours to obtain Wider's deposition testimony, with very little success. Therefore, because no circumstances exist here that would make an award of expenses unjust, the Court will require Wider to pay the reasonable expenses incurred by GMAC in preparing and arguing the instant motion, including attorney's fees, pursuant to Rule 37(a)(5)(A).

On January 3, 2008, GMAC filed a fee petition indicating that it incurred \$13,026.00 in fees and expenses in connection with the motion to compel. HTFC has not objected to the fee petition. Therefore, as there is no objection, and the Court finds the amount to be reasonable, HTFC will be ordered to pay GMAC \$13,026.00, pursuant to Rule 37(a)(5)(A).

b. Violation of Rule 30(d)(2)

[3] As discussed above, "[t]he court may impose an appropriate sanction-including the reasonable expenses and attorney's fees incurred by any party-on a person who impedes, delays, or frustrates the fair examination of the deponent." Fed.R.Civ.P. 30(d)(2). As with Rule 37(a)(5)(A), an award of costs and fees under Rule 30(d)(2) may be used to compensate the party aggrieved by the frustration of the deposition. See Plump, 2003 WL 23019166, at *1 ("[C]osts and attorneys' fees awarded are those incurred as a result of the frustration of fair deposition examination. Thus, time that may have

been appropriately spent in order to represent the client might not necessarily qualify as time that can be reimbursed as a sanction." (emphasis added)).

*194 Here, the record is replete with evidence that Wider willfully and in bad faith impeded, delayed, and frustrated his fair examination. *See supra* Part III.B.1.b. Although the deposition lasted for nearly 12 hours, little of Wider's testimony is of any value due to his willful frustration of the deposition. In light of this clear violation of Rule 30(d)(2), the Court will impose sanctions upon Wider.

The Court will order Wider to pay the reasonable expenses and attorney's fees incurred by GMAC in preparing for and conducting the portion of the deposition sessions on September 26 and November 8, 2007 that was frustrated by Wider's conduct. On January 3, 2008, GMAC filed a fee petition indicating that it incurred \$16,814.60 in attorney's fees and \$3685.66 in costs in connection with Wider's deposition. HTFC has not objected to the fee petition. Upon a detailed review of the transcript and video recording of the deposition sessions, the Court finds that approximately 75% of the time spent deposing Wider was time wasted due to Wider's frustration of fair examination. Therefore, the Court will impose upon Wider a sanction consisting of the costs incurred in connection with his deposition (\$3685.66), plus 75% of the attorney's fees incurred in connection with the deposition (\$12,610.95), or \$16,296.61.

IV. RULE TO SHOW CAUSE AS TO SANCTIONS AGAINST ZICCARDI

The Court turns now to the question of whether defense counsel Joseph Ziccardi's conduct at Wider's deposition warrants sanctions under the Federal Rules of Civil Procedure. $\stackrel{FN14}{\longrightarrow}$

FN14. Ziccardi was not the only attorney representing Wider or HTFC during Wider's deposition. Raymond Voulo, Esq., Wider's New York counsel, was also present at, but did not defend, the deposition. The Court does not consider sanctions against Voulo because he is not an attorney of record in this case. Daniel

Strick, Esq., HTFC's local counsel and Ziccardi's sponsor for admission *pro hac vice*, is an attorney of record in this case. The parties agree, however, that Strick was not involved in Wider's deposition, and thus sanctions will not be considered against him either. The Court will only consider sanctions against Ziccardi, who was counsel for Wider at the deposition and is lead counsel for HTFC in this case. Ziccardi has received ample notice of the specific sanctions considered by the Court and opportunity to be heard. *See supra* note 6.

A. Legal Standard

The Federal Rules specifically provide for sanctions if "a deponent['s] fail [ure] to answer a question" or "evasive or incomplete" answers at a deposition necessitate a motion to compel. Fed.R.Civ.P. 37(a)(3)(B)(i), (a)(4), (a)(5)(A). These sanctions can apply to attorneys: "If the motion is granted ... the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed.R.Civ.P. 37(a)(5)(A) (emphasis added). Therefore, an attorney who improperly "advis [es]" a deponent to provide evasive or incomplete answers or to refuse to answer questions propounded at a deposition is subject to sanctions. Sanctions must be imposed unless "circumstances make an award of expenses unjust." Fed.R.Civ.P. 37(a)(5)(A)(i)-(iii).

In addition, an attorney may be sanctioned for engaging in conduct that "impedes, delays, or frustrates the fair examination of the deponent." Fed.R.Civ.P. 30(d)(2) (empowering a court to impose an "appropriate sanction," including "reasonable expenses and attorney's fees incurred by any party"); see also In re BWP Gas, 2006 WL 2883012, at *1 (noting that Rule 30(d)(2) can apply to "any ... person involved in the deposition"); Redwood v. Dobson, 476 F.3d 462, 469-70 (7th Cir.2007) (applying Rule 30(d)(2) sanctions to an attorney for failing to adjourn a futile deposition and improperly instructing his client not to respond to ques-

tions).

B. Discussion

1. Summary of Ziccardi's conduct

As evidenced by the portions of the record quoted at length above, throughout the deposition, notwithstanding the severe and repeated nature of Wider's misconduct, Ziccardi persistently failed to intercede and correct *195 Wider's violations of the Federal Rules. See supra Part III.B.1. Instead, Ziccardi sat idly by as a mere spectator to Wider's abusive, obstructive, and evasive behavior; and when he did speak, he either incorrectly directed the witness not to answer, FN15 dared opposing counsel to file a motion to compel, or even joined in Wider's offensive conduct.

FN15. See, e.g., Wider Dep., Nov. 8, 2007, at 363:17-365:9; Wider Dep., Sept. 26, 2007, at 74:15-76:24.

FN16. See Wider Dep., Nov. 8, 2007, at 366:15-367:3 (after Wider answered the question "Where is the information that would describe those loans?" with "Can you spell your name backwards, Bob?," Ziccardi defended the response: "Take whatever action you want to take. I mean, he is trying to answer the questions and he is answering the questions and he will continue to answer the questions"); *id.* at 363:17-365:9 (challenging opposing counsel to "file whatever motion you want to file" after Wider improperly refused to answer a question).

FN17. See Wider Dep., Nov. 8, 2007, at 372:7-14 (Ziccardi chuckling at Wider's abusive behavior toward counsel for GMAC, which was followed by this response from counsel for GMAC: "You know, your snickering counsel is not appropriate either because all you're doing is encouraging the behavior of your client").

2. Ziccardi's defenses of his conduct

a. Adequacy of intervention

Ziccardi argues that he made sufficient efforts to intervene and curb his client's misconduct. To that effect, the few attempts that Ziccardi did make to control his client were limited to mildly worded requests to Wider to answer a question or not interrupt counsel for GMAC. *See*, *e.g.*, Wider Dep., Sept. 26, 2007, at 26:23, 37:3, 69:8, 114:12, 158:12, 204:7, 231:4-232:8, 254:12-256:6.

Ziccardi avers that many of his efforts to correct his client's misconduct occurred off the record. Even if this assertion is to be believed, Wider's continuing misconduct indicates that whatever efforts Ziccardi made were woefully ineffectual. In fact, Ziccardi's meek attempts to intercede and his otherwise silent toleration of Wider's conduct only emboldened Wider to further flout the procedural rules:

MR. BODZIN: I'm going to ask the question again and I'll ask it a different way so as to make sure that I'm not characterizing this witness's testimony.

THE WITNESS: Get his [Ziccardi's] permission.

MR. BODZIN: I don't need his permission.

THE WITNESS: Yes you do.

Q. My question is in submitting loans originated by HTFC for purchase by GMAC, was it HTFC's policy that so long as there was an appraisal that supported the value of the property, it was not up to HTFC to report to GMAC flip activity?

MR. ZICCARDI: Same objection. Go ahead.

A. My attorney just told you to get fucked and so did I.

MR. ZICCARDI: No.

THE WITNESS: Okay. That's for the record.

Q. First of all, your attorney didn't tell me that. You told me that and now you can answer the question.

A. Go get fucked.

Q. You're not answering the question?

A. I did answer your question.

Q. No, that's not an answer to the question.

A. That's my answer to your question.

Q. Okay.

A. My attorney very nicely told you that he objects. Fuck you. And I'm telling you on behalf of my attorney, fuck you.

Id. at 256:11-259:7.

It is true that any attorney can be blindsided by a recalcitrant client who engages in unexpected sanctionable conduct at a deposition. An attorney faced with such a client cannot, however, simply sit back, allow the deposition to proceed, and then blame the client when the deposition process breaks down. See Redwood, 476 F.3d at 469-70 ("It is precisely when animosity runs high that playing by the rules is vital.... Because depositions take place in law offices rather than courtrooms, adherence to professional *196 standards is vital, for the judge has no direct means of control.").

Moreover, Ziccardi was not blindsided by Wider. Rather, he had ample notice of Wider's intent to frustrate the deposition. Wider's first outburst and unilateral interruption of the deposition occurred a mere *six* minutes after the deposition had begun. *See* Wider Dep. Video, Sept. 26, 2007, at 9:21-22. Wider's first use of profanity and hostile behavior toward opposing counsel occurred only a few minutes later. *See id.* at 9:27:30-9:28:00. Therefore, Ziccardi was on notice at an early point during the deposition of his client's hostility toward opposing counsel and efforts to frustrate the deposition. Nonetheless, Ziccardi allowed the deposition to drag on for over two days and nearly twelve hours of testimony, much of which was an unmitigated waste of time and resources.

Ziccardi never once suggested that the ill-fated deposition be adjourned. In fact, even though the deposition was being taken over 100 miles away from counsel for GMAC's home office, it was counsel for GMAC who suggested adjournment several times, *see* Wider Dep., Nov. 8, 2007, at 366:23, 433:20, and who eventually adjourned the deposition after enduring the last of many onslaughts from Wider:

Q. Yes or no, did he ask you if you had any documents?

A. Shut the fuck up. Don't raise your voice to me.

MR. BODZIN: We're adjourning this deposition.

THE WITNESS: Good.

MR. BODZIN: We're adjourning this deposition. We're going back to the Judge. We're going to let the Judge decide if this was an appropriate way for anybody to behave at a deposition. I'm not going to continue-

THE WITNESS: You don't point your fucking fingers at me. You don't raise your fucking voice at me. And I'm going to spit right back at you.

MR. BODZIN: I'm not going to continue to be subject to this harassment, this rudeness is absolutely inappropriate conduct and I'm going to adjourn this deposition right now.

THE WITNESS: Good.

Id. at 439:4-24.

Based on the record, the Court rejects the argument that Ziccardi made adequate efforts to curb Wider's misconduct.

b. Good faith

Ziccardi argues that his actions at Wider's deposition were not taken in bad faith, but rather with the intent to "move the discovery process along by attempting to complete the deposition of Mr. Wider." Deft.'s Memo. of Law in Resp. to Plf.'s Mot. to Compel and Rule to Show Cause 8-9.

However, the imposition of sanctions under Federal Rules of Civil Procedure 30(d)(2) and 37(a)(5)(A) does

not require a finding of bad faith. See Sicurelli v. Jeneric/Pentron, Inc., No. 03-4934, 2005 WL 3591701, at *8 (E.D.N.Y. Dec.30, 2005) ("[F]or purposes of Rule [30(d)(2)], a clear showing of bad faith on the part of the attorney against whom sanctions are sought is not required. Instead, the imposition of sanctions under Rule [30(d)(2)] requires only that the attorney's conduct frustrated the fair examination of the deponent."); Pucket v. Hot Springs Sch. Dist. No. 23-2, 239 F.R.D. 572, 588 (D.S.D.2006) (same); Devaney v. Cont'l Am. Ins. Co., 989 F.2d 1154, 1162 (11th Cir.1993) (rejecting "the notion of a bad faith requirement" under Rule 37(a)(5)(A) (citing Merritt v. Int'l Brotherhood of Boilermakers, 649 F.2d 1013, 1019 (5th Cir.1981))).

Even if a finding of bad faith were required here, the record, viewed as a whole, inexorably leads to the conclusion that Ziccardi's conduct was undertaken in bad faith. Given the length of the deposition and the severe, repeated, and pervasive nature of Wider's misconduct, it is clear that Ziccardi's failure to intervene was not merely negligent, but rather willful. Ziccardi's bad faith is further revealed by his challenges to opposing counsel to "file whatever motion you want to file" and his snickering at Wider's abusive conduct. FN18 Wider Dep., Nov. 8, 2007, at *197 363:17-365:9, 372:7-14; see Prudential, 278 F.3d at 190 (affirming finding of bad faith because "[w]hen viewed individually, each single instance of misbehavior by [counsel] might not warrant the sanctions arrived at by the court," but "considered as a whole, his transgressions evidence a pattern of obfuscation and mean spiritedness"). Therefore, even if a finding of bad faith were required, the record supports such a finding in this case.

FN18. *In re Minniti*, 242 B.R. 843 (Bankr.E.D.Pa.2000), cited by Ziccardi, is consistent with a finding of bad faith here. *See id.* at 850 (imposing sanctions and noting that "bad faith may be inferred when the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose" (quotation omitted)).

c. Confidentiality

Ziccardi further attempts to justify his conduct by arguing that the questions propounded at the deposition by counsel for GMAC sought confidential information and thus were properly not answered by Wider. However, Ziccardi did not generally object to the questions on that basis at the deposition, and he did not seek an adjournment to obtain a protective order, as permitted by Federal Rule of Civil Procedure 30(d)(3)(A). See supra note 11. In fact, HTFC did not move for a protective order until a month after the deposition had concluded. Having failed to timely object to the questions at the deposition and/or move for a protective order, Ziccardi cannot now justify his failure to control his client on the basis that he sought to protect the confidentiality of certain communications at the deposition.

FN19. On at least one occasion during the deposition, Ziccardi demonstrated that he knew that he was authorized under the Federal Rules to object to questions seeking confidential information, *see* Wider Dep., Nov. 8, 2007, at 363:17-365:9 ("I'm going to object ... on the basis ... [that] I think it seeks confidential proprietary business information of HTFC which HTFC is not going to disclose.").

3. Rule to show cause as to sanctions

Because he has failed to show cause why sanctions should not be imposed, the Court will impose sanctions upon Ziccardi.

a. Violation of Rule 37(a)(3)(B)(i)

As explained above, if a motion to compel is necessitated by a deponent's "evasive or incomplete" answers or "failure to answer" questions, the movant may seek sanctions against the "attorney advising that conduct." Fed.R.Civ.P. 37(a)(3)(B)(i), (a)(4), (a)(5)(A). It is beyond dispute that Wider provided evasive and incomplete answers and failed to answer questions propounded at his deposition. *See supra* Part III.B.1.c. The remaining question is whether Ziccardi "advis[ed]" Wider's misconduct.

[4] It is true that, in most instances, Ziccardi did not actively counsel Wider on the record to provide evasive

or incomplete answers or to refuse to answer questions. What is remarkable about Ziccardi's conduct is not his actions, but rather his failure to act. Despite the pervasiveness of Wider's evasive and incomplete answers and his repeated failure to answer questions, Ziccardi failed to take remedial steps to curb his client's misconduct.

The nature of Wider's misconduct was so severe and pervasive, and his violations of the Federal Rules of Civil Procedure so frequent and blatant, that any reasonable attorney representing Wider would have intervened in an effort to curb Wider's misconduct. Ziccardi's failure to address, then and there, Wider's misconduct could have no other effect but to empower Wider to persist in his behavior. Under these circumstances, the Court equates Ziccardi's silence with endorsement and ratification of Wider's misconduct. This endorsement *198 and ratification by Ziccardi is the functional equivalent of "advising [Wider's] conduct" under Rule 37(a)(5)(A).

FN20. Ziccardi's endorsement of Wider's evasive and incomplete answers and failure to answer is further evidenced by Ziccardi's statements on the record. See, e.g., Wider Dep., Nov. 8, 2007, at 363:17-365:9 (challenging opposing counsel to "file whatever motion you want to file" after Wider had improperly refused to answer a question); id. at 366:15-367:3 ("Take whatever action you want to take. I mean, he is trying to answer the questions and he is answering the questions and he will continue to answer the questions."). Ziccardi's endorsement of Wider's conduct is most clearly shown by these statements: Ziccardi endorsed Wider's misconduct so thoroughly that he dared opposing counsel to file the instant motion to compel.

Rule 37(a)(5)(A) provides for sanctions against the "party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both." Fed.R.Civ.P. 37(a)(5)(A). Because Ziccardi's actions and inaction at Wider's deposition constitute the functional equivalent of "advising" Wider's misconduct, Ziccardi must compensate GMAC for the expense it in-

curred in having to file the instant motion to compel. *See Hutto*, 437 U.S. at 690 n. 14, 98 S.Ct. 2565 ("The award ... makes the prevailing party whole for expenses caused by his opponent's obstinacy."). FN21

FN21. Even if Rule 37(a)(5)(A) did not contemplate such sanctions, the Court would be authorized to sanction Ziccardi pursuant to its inherent authority. See In re Cendant Corp., 260 F.3d 183, 199 (3d Cir.2001) ("This Court ... has recognized the authority of district courts to wield sanctioning power, in the form of the court's 'inherent authority,' where necessary to preserve the integrity of the judicial process."); see also Tr., Dec. 7, 2007, at 5 (providing notice to Ziccardi that the Court may consider sanctions pursuant to its "inherent power"); supra Part IV.B.2.b (noting that Ziccardi engaged in bad faith conduct, which is a prerequisite for the imposition of sanctions pursuant to the Court's inherent authority).

Accordingly, because the circumstances here do not make the imposition of sanctions unjust, Ziccardi will be ordered to pay to GMAC, jointly and severally with Wider, the \$13,026.00 in fees and expenses that GMAC incurred in connection with the motion to compel. *See supra* Part III.B.3.a.

b. Violation of Rule 30(d)(2)

[5] As discussed above, "[t]he court may impose an appropriate sanction-including the reasonable expenses and attorney's fees incurred by any party-on a person who impedes, delays, or frustrates the fair examination of the deponent." Fed.R.Civ.P. 30(d)(2).

The Court has no difficulty finding that Ziccardi's inaction impeded, delayed, and frustrated Wider's fair examination. FN22 For example, had Ziccardi prevented Wider from improperly interposing his own objections, the deposition would have proceeded in a much more expeditious manner. Had Ziccardi curbed Wider's abusive bullying of counsel for GMAC, counsel for GMAC would not have been forced to adjourn the deposition before its completion. Had Ziccardi warned Wider that

providing evasive and incomplete answers would result in sanctions, the deposition could have been completed without requiring the Court's intervention. Instead, Ziccardi's persistent inaction in the face of Wider's gross misconduct impeded, delayed, and contributed to the total frustration Wider's deposition.

FN22. Rule 30(d)(2) does not require that an attorney take some affirmative act in order to frustrate a deposition, but rather contemplates sanctions for attorney inaction as well. See Fed.R.Civ.P. 30(d)(2) (authorizing sanctions upon any "person who impedes, delays, or frustrates the fair examination of the deponent"); see, e.g., Redwood, 476 F.3d at 467-69 (imposing Rule 30(d)(2) sanctions upon an attorney for failing to suspend a contentious and fruitless deposition, failing to seek a protective order that would have cured the confidentiality dispute hindering the deposition, and instead improperly instructing his client not to answer questions).

Therefore, Ziccardi will be sanctioned for violating Rule 30(d)(2). The Court will order Ziccardi to pay to GMAC, jointly and severally with Wider, the \$16,296.61 in costs and fees incurred by GMAC in connection with the deposition. *See supra* Part III.B.3.b.

V. CONCLUSION

Wider's conduct was outrageous. Ziccardi's complicity is inexcusable. Therefore, sanctions will be imposed.

It is the Court's hope that these sanctions will motivate Wider and HTFC to proceed in a civil and expeditious manner with this deposition and the remainder of discovery, and Ziccardi to adhere faithfully to the Federal Rules of Civil Procedure. FN23 Otherwise, more *199 severe sanctions will follow.

FN23. As an officer of the Court admitted *pro hac vice*, Ziccardi is subject to the Pennsylvania Rules of Professional Conduct. *See id.* ("Acts or omissions by an attorney admitted to practice before this Court ... which vi-

olate the [Pennsylvania] Rules of Professional Conduct ... shall constitute misconduct and shall be grounds for discipline."). Ziccardi's conduct at Wider's deposition also violated several Rules of Professional Conduct. See, e.g., Pa. R. Prof'l Conduct 8.4(d) (providing that it is a violation of the rules to "engage in conduct that is prejudicial to the administration of justice"); Pa. R. Prof'l Conduct 3.5 & cmt 5 (providing that "[a] lawyer shall not ... engage in conduct intended to disrupt a tribunal," which includes "a deposition"); Pa. R. Prof'l Conduct 3.4 & cmt. 1 (providing that an attorney may not "unlawfully obstruct another party's access to evidence," which includes using "obstructive tactics in discovery procedure"). Ordinarily, a disciplinary authority is the proper forum for determining whether professional discipline is warranted for violations of the Rules of Professional Conduct. See Greenfield v. U.S. Healthcare, Inc., 146 F.R.D. 118, 128 (E.D.Pa.1993). The Court will refrain from referring this matter to a disciplinary authority in this case, however, because the sanctions imposed pursuant to the Federal Rules of Civil Procedure are sufficient to achieve the remedial purpose of the Rules of Professional Conduct. Should the misconduct continue, however, referral to a disciplinary authority may be considered.

FN24. See, e.g., Nat. Grange Mut. Ins. Co. v. Sharp Equip. Co., No. 01-0628, 2002 WL 442823, at *7-8 (E.D.Pa.2002) ("One additional and important factor is that all of the evasive, untruthful, delaying, and combative responses to deposition questions were supplied by Mr. Korey Blanck, the president and sole shareholder of Sharp Equipment Company. As his outrageous conduct during his depositions is the primary reason for the pending motion for sanctions, we weigh this factor very strongly in favor of dismissing Sharp Equipment's and Mr. Blanck's claims and counterclaims.").

The motion to compel and for sanctions (doc. no. 34) will be granted. Sanctions will be imposed on Aaron Wider and Joseph Ziccardi, jointly and severally, in the amount of \$29,322.61. An appropriate order follows.

ORDER

AND NOW, this **29th** day of February, 2008, for the reasons stated in the accompanying Memorandum, it is hereby **ORDERED** that Plaintiff's motion to compel and for sanctions (doc. no. 34) is **GRANTED**.

IT IS FURTHER ORDERED that the deposition of Aaron Wider shall take place at the U.S. Courthouse, 601 Market Street, Philadelphia, PA, before a magistrate judge, within 30 days of the date of this order, at a date and time to be designated by the magistrate judge.

IT IS FURTHER ORDERED that Aaron Wider and Joseph Ziccardi shall pay, jointly and severally, to GMAC Bank the amount of \$13,026.00, representing the fees and expenses incurred by GMAC Bank in connection with the instant motion to compel by March 25, 2008.

IT IS FURTHER ORDERED that Aaron Wider and Joseph Ziccardi shall pay, jointly and severally, the amount of \$16,296.61, representing the expenses and 75% of the fees incurred by GMAC Bank in connection with Wider's deposition in New York, N.Y. on September 26 and November 8, 2007, by March 25, 2008.

IT IS FURTHER ORDERED that the motion for protective order (doc. no. 39) is **DENIED without pre-judice**.

FN25. See Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir.1994). HTFC does not explain, as to each document or set of documents, why the documents should be designated confidential.

IT IS FURTHER ORDERED that Defendant shall produce a copy of the documents filed under seal pursuant to the order of December 21, 2007 (doc. no. 46) to Plaintiff.

AND IT IS SO ORDERED.

E.D.Pa.,2008. GMAC Bank v. HTFC Corp. 248 F.R.D. 182

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Slip Copy, 2011 WL 5825423 (D.Kan.) (Cite as: 2011 WL 5825423 (D.Kan.))

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Only the Westlaw citation is currently available.

United States District Court,
D. Kansas.

PRO FIT MANAGEMENT, INC. d/b/a Draft Increase Solutions, Plaintiff,

LADY OF AMERICA FRANCHISE CORPORA-TION, et al, Defendant.

Civil Action No. 08–CV–02662–JAR–DJW. Nov. 17, 2011.

Arthur K. Shaffer, Intellectual Property Center, LLC, Overland Park, KS, Carl H. Hoffman, Hoffman & Hertzig, PA, Coral Gables, FL, for Plaintiff.

Joan K. Archer, Robert O. Lesley, Lathrop & Gage LLP, Kansas City, MO, Himanshu M. Patel, Robert Zarco, Zarco, Einhorn, Salkowski & Brito, PA, Miami, FL, for Defendants.

MEMORANDUM AND ORDER

DAVID J. WAXSE, United States Magistrate Judge.

*1 Pending before the Court is Plaintiff's Motion to Compel Production of Documents (ECF No. 208). Plaintiff moves the Court to compel Defendant to produce documents responsive to Plaintiff's Fourth Request for Production, specifically, Request Nos. 5, 6, 7, 8, 9, and 10. The facts pertinent to this motion are as follows. On April 11, 2011, Defendant served Plaintiff with Defendant's Responses and Objections to Plaintiff's Fourth Request for Production. On May 11, 2011, Plaintiff's counsel telephoned Defendant's counsel to discuss disputes related to the Request for Production. In the course of that phone call, Defendant's counsel requested that Plaintiff submit a written document describing its position as to Defendant's responses to Requests Nos. 5–10. Plaintiff filed this Motion to Compel on that same day, May 11, 2011. Defendant opposes this Motion to Compel on the grounds that Plaintiff filed this Motion in violation of D. Kan. R. 37.2 by failing to make a reasonable effort to confer prior to such filing. FN1 Plaintiff asserts that it did make a good faith effort to confer by "calling counsel for defendant in an effort to determine whether defendant would produce the requested documents." FN2

FN1. See ECF No. 212.

FN2. ECF No. 213

Fed.R.Civ.P. 37(a)(1) requires any motion to compel discovery to include a "certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."

In conjunction with Fed.R.Civ.P. 37, District of Kansas Rule 37.2 provides:

The court will not entertain any motion to resolve a discovery dispute pursuant to Fed.R.Civ.P. 26 through 37 ... unless counsel for the moving party has conferred or has made reasonable effort to confer with opposing counsel concerning the matter in dispute prior to the filing of the motion.

* * *

A "reasonable effort to confer" means more than mailing or faxing a letter to the opposing party. It requires that the parties in good faith converse, confer, compare views, consult and deliberate, or in good faith attempt to do so.

The purpose of the local rule is to encourage the parties to satisfactorily resolve their discovery disputes prior to resorting to judicial intervention.

Meet and confer requirements are not satisfied "by requesting or demanding compliance with the requests for discovery."

The parties must determine precisely what the requesting party is actually seeking, what responsive documents or information the discovering party is reasonably capable of

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producing, and what specific, genuine objections or other issues, if any, cannot be resolved without judicial intervention. $\overline{FN5}$

FN3. VNA Plus, Inc. v. Apria Healthcare Group, Inc., No. Civ. A. 98–2138–KHV, 1999 WL 386949, at *1 (D. Kan. June 8, 1999).

FN4. Cotracom Commodity Trading Co. v. Seaboard Corp., 189 F.R.D. 456, 459 (D.Kan.1999).

FN5. Id.

The Plaintiff's efforts to confer before filing the motion appear minimal at best. Reasonable effort to confer requires that the parties "in good faith converse, confer, compare views, consult and deliberate, or in good faith attempt to do so." FN6 Plaintiff described its phone call to Defendant's counsel as an attempt to "determine whether defendant would produce the requested documents." Plaintiff fails to provide any other facts that would lead the Court to conclude that the communication between the parties was aimed at identifying and resolving the disputed issues regarding Plaintiff's Fourth Request for Production. As a result, the Court finds this phone call appears to be a mere request for compliance and falls short of the meet and confer requirements of Fed.R.Civ.P. 37(a)(1) and D. Kan. Rule 37.2.

FN6. D. Kan. Rule 37.2.

*2 IT IS THEREFORE ORDERED that Plaintiff's Motion to Compel Production (ECF No. 208) is denied, as set forth herein.

D.Kan.,2011.

Pro Fit Management, Inc. v. Lady of America Franchise Corp.

Slip Copy, 2011 WL 5825423 (D.Kan.)

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Slip Copy, 2011 WL 381611 (D.Kan.) (Cite as: 2011 WL 381611 (D.Kan.))

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Only the Westlaw citation is currently available.

United States District Court,
D. Kansas.

LAYNE CHRISTENSEN COMPANY, and Dr.

Arup Sengupta, Plaintiffs,

The PUROLITE COMPANY, Defendant.

Civil Action No. 09-2381-JWL-GLR. Jan. 25, 2011.

Angela G. Harse, Joshua M. Ellwanger, Patrick D. Kuehl, Jr., Richard R. Johnson, Husch Blackwell LLP, Kansas City, MO, for Plaintiffs.

David R. Barnard, Jason C. Parks, Lathrop & Gage LLP, Kansas City, MO, Robert C. Sullivan, Jr., David Francescani, J. Rodrigo Fuentes, Michael T. Zoppo, Fish & Richardson PC, New York City, NY, for Defendant.

MEMORANDUM AND ORDER

GERALD L. RUSHFELT, United States Magistrate Judge.

*1 In this patent infringement and breach of contract action, Plaintiffs allege that Defendant, a former licensee, infringed upon a patent for removal of arsenic from drinking water and breached the post termination provisions of their license agreement. Currently pending before the Court are Plaintiffs' Motion for Protective Order (ECF No. 66) and Second Motion for Protective Order (ECF No. 89). Pursuant to Fed.R.Civ.P. 26(c), Plaintiffs request that the Court enter a protective order relieving them of the burden of responding to a collective 626 requests for admission served upon them by Defendant. As set forth below, both motions are denied.

FN1. This number is comprised of 277 First Requests for Admission to Layne, 329 First Requests for Admission to Sen-

Gupta, and 20 Second Requests for Admission to Layne.

I. Relevant Factual Background

Plaintiffs Layne Christensen Company ("Layne") and Dr. Arup SenGupta ("SenGupta") assert claims for patent infringement and breach of contract against Defendant. They allege that Defendant, a former licensee, infringed upon United States Patent No. 7,291,578 issued to SenGupta for removal of arsenic from drinking water by its refusal to stop making and selling the arsenic removal product after termination of the license agreement. They also allege that Defendant breached the post-termination provisions of the license agreement.

In its Second Amended Answer filed September 15, 2010, Defendant asserts nine counterclaims. It asserts a counterclaim for breach of contract, and for a declaration of non-infringement and patent misuse, as well as rescission of the contract. It also asserts counterclaims for restraint of trade under K. S.A. 50-112, unfair competition under common law, patent invalidity, and recoupment.

FN2. See Def.'s Second Am. Answer to Am. Compl. (ECF No. 111).

On June 9, 2010, Defendant served its First Set of Requests for Admission to Layne, comprised of 277 requests for admission. That same day, it also served its First Set of Requests for Admission to SenGupta, comprised of 329 requests for admission.

FN3. See Def. Purolite's First Set of Req. for Admis. to Layne (ECF No. 67-1).

FN4. See Def. Purolite's First Set of Req. for Admis. to SenGupta (ECF No. 67-2).

On July 13, 2010, Defendant served another 20 requests for admission in its Second Set of Requests for Admission to Layne.

II. Whether Plaintiffs have Satisfied Their Duty to Confer

Defendant argues that Plaintiffs' motions should be denied because they failed to meet and confer as required by Fed.R.Civ.P. 37(a)(1) and D. Kan. Rule 37.2. With respect to the first motion for protective order, it agrees that the parties met and conferred with respect to some, but not all, issues. In particular, it faults Plaintiffs for failing to identify any particular requests for admission during the meet and confer process. As to the second motion for protective order, Defendant claims that the parties never discussed the second set of requests for admission prior to the filing of the motion. It argues that Plaintiffs cannot meet their duty to confer on the second set of requests for admission by merely referencing the meet and confer discussions regarding the first set.

Fed.R.Civ.P. 37(a)(1) requires any motion to compel discovery to include a "certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."

*2 In conjunction with Fed.R.Civ.P. 37, District of Kansas Rule 37.2 provides:

The court will not entertain any motion to resolve a discovery dispute pursuant to Fed.R.Civ.P. 26 through 37 ... unless counsel for the moving party has conferred or has made reasonable effort to confer with opposing counsel concerning the matter in dispute prior to the filing of the motion.

* * *

A "reasonable effort to confer" means more than mailing or faxing a letter to the opposing party. It requires that the parties in good faith converse, confer, compare views, consult and deliberate, or in good faith attempt to do so.

The purpose of the local rule is to encourage the parties to satisfactorily resolve their discovery disputes prior to resorting to judicial intervention. FN5 Meet and confer requirements are not satisfied "by requesting or demanding compliance with the requests for discovery." FN6 The parties must determine precisely what the requesting party is actually seeking, what responsive documents or information the discovering party is reasonably capable of producing, and what specific, genuine objections or other issues, if any, cannot be resolved without judicial intervention.

FN5. VNA Plus, Inc. v. Apria Healthcare Grp., Inc., No. Civ. A. 98-2138-KHV, 1999 WL 386949, at *1 (D. Kan. June 8, 1999).

FN6. Cotracom Commodity Trading Co. v. Seaboard Corp., 189 F.R.D. 456, 459 (D.Kan.1999).

FN7. Id.

In their first Motion for Protective Order (ECF No. 66), Plaintiffs certify that they in good faith conferred with defense counsel prior to filing the motion. They further identified their efforts to confer, including exchanging several e-mails defense counsel, and a lengthy telephone conference on June 30, 2010 in an attempt to resolve the discovery dispute. Additionally, they reported that they provided case citations supporting their argument that Defendant's requests for admission are unduly burdensome and oppressive. In their reply, Plaintiffs indicate that at the June 30 meet and confer conference, they in fact identified a number of requests that were improper and contributed to the excessive number of requests.

In their certification in their second Motion for Protective Order (ECF No. 89), Plaintiffs certify that they made "a good faith attempt to resolve [the] dispute over the quantity of requests for admission when this issue first arose," after Defendant served the original 606 requests for admission on Plaintiff. They then list the efforts made during the original meet and confer process related to Defendant's first 606 requests for admission.

They then state:

FN8. See Pls.' Second Mot. for Protective Order (ECF No. 89) at p. 2 (emphasis added).

Based on Defendant's previous position, which Plaintiff assumes has not changed in light of the fact that Defendant served additional requests on Plaintiff despite Plaintiffs' previous objections related to the excessiveness of the original 606 requests, Plaintiff's counsel did not engage in another meet and confer process related to the exact same issue on which the parties had conferred approximately one month earlier.

FN9. Id.

The Court finds that Plaintiffs have made sufficient efforts to confer before filing their first motion for protective order. They exchanged emails with defense counsel, provided case citations in support of their position, as well as participating in a lengthy telephone conference to discuss their objections to what they believe to be an excessive number of requests for admission. Defendant agrees that Plaintiffs met and conferred with respect to some of the issues raised in their first motion to compel. It contends, however, that the motion for protective order should be denied because Plaintiffs failed to identify any particular requests for admission during the meet and confer process. The Court finds that Plaintiffs made adequate efforts to confer with respect to their first motion for protective order. Although they may not have identified the specific requests for admission that they now reference as examples in their motion, Defendant was sufficiently on notice as to the general substance of Plaintiffs' objections to its requests for admission.

*3 While Plaintiffs have met their duty to confer with respect to the first motion for protective order, they have shown no effort to meet and confer about Defendant's second set of requests for admission, the subject of their second motion for protective order. The Court does not accept their reliance

upon prior conferring efforts for the first set of requests to satisfy the duty to confer about the second set. D. Kan. Rule 37.2 requires counsel for the moving party to confer or make reasonable effort to confer with opposing counsel, "concerning the matter in dispute." The matter in dispute in the second motion is the second set of requests for admission. Plaintiffs had the duty to exert some reasonable effort to confer with opposing counsel about the second set. The rule does not contemplate indulgence for a belief that could be mistaken. Plaintiffs have failed to attempt to confer as to the matter in dispute for their second Motion for Protective Order (ECF No. 89), i.e., Defendant's Second Set of Requests for Admission, this motion is denied.

III. Whether Plaintiffs Have Shown Good Cause for a Protective Order Relieving Them from Responding to the First Set of Requests for Admission

Plaintiffs seek a protective order against Defendant's first set of requests for admission. In support of their motion, they contend the requests are unduly burdensome and oppressive because they are too numerous. Additionally they argue that Defendant will receive little benefit from responses to 606 requests, because many of them are duplicative, aimed at the wrong party, converses of other requests, and otherwise improper and objectionable. They assert that the burden and expense of responding to the numerous requests is unreasonable, because this is an "uncomplicated and straightforward" case with only two plaintiffs with aligned interests and only one defendant. Although the case involves alleged patent infringement and breach of a licensing agreement, they point out only one patent is at issue with only 15 claims and that the issues relevant to contract overlap those relevant to the patent. Plaintiffs also contend the factual issues are fairly limited and do not justify the excessive number of requests for admission served by Defendant. Consequently, Plaintiffs ask the Court to issue a protective order to relieve them from responding to Defendant's first set of requests for admission in their entirety.

A. Objection That Responding to Excessive Number of Requests for Admission Is Unduly Burdensome and Oppressive

Federal Rule of Civil Procedure 26(c)(1) provides that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." As the parties seeking the protective order, Plaintiffs have the burden to show good cause for its entry. To establish good cause under Rule 26(c), a party must make "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." FN12

FN10. Fed.R.Civ.P. 26(c).

FN11. Reed v. Bennett, 193 F.R.D. 689, 691 (D.Kan.2000).

FN12. Gulf Oil Co. v. Bernard, 452 U.S. 89, 102 n. 16 (1981).

*4 The court has broad discretion to decide when a protective order is appropriate and what degree of protection is required. FN13 The Supreme Court has recognized that "[t]he trial court is in the best position to weigh fairly the competing needs and interests of the parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders." FN14 Furthermore, the court is required by Fed.R.Civ.P. 26(b)(2)(C) to limit the frequency or extent of discovery if it determines that the discovery sought is unreasonably cumulative or duplicative. The court is also required to limit discovery if it finds that "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." FN16

FN13. MGP Ingredients, Inc. v. Mars, Inc., 245 F.R.D. 497, 500 (D.Kan.2007)

(quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984)).

FN14. Seattle Times, 467 U.S. at 36.

FN15. Fed.R.Civ.P. 26(b)(2)(C)(i).

FN16. Fed.R.Civ.P. 26(b)(2)(C)(iii).

Federal Rule of Civil Procedure 36 governs requests for admission. It permits a party to serve "a written request to admit ... the truth of any matters within the scope of Rule 26(b)(1) relating to: (A) facts, the application of law to fact, or opinions about either; and (B) the genuineness of any described documents." FN17 The advisory committee notes to Rule 36 explain that requests for admission serve "two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be." FN18 "The purpose of a request for admissions generally is not to discover additional information concerning the subject of the request, but to force the opposing party to formally admit the truth of certain facts, thus allowing the requesting party to avoid potential problems of proof." FN19

FN17. Fed.R.Civ.P. 36(a)(1).

FN18. Fed.R.Civ.P. 36 advisory committee's note (1970 Amendment).

FN19. Audiotext Commc'ns Network, Inc. v. U.S. Telecom, Inc., Civ. A. No. 94-2395-GTV, 1995 WL 625744, at * 1 (D.Kan. Oct. 5, 1995) (quoting Hurt v. Coyne Cylinder Co., 124 F.R.D. 614, 615 (W.D.Tenn.1989)).

Neither the Federal Rules of Civil Procedure, nor the local rules for the District of Kansas, sets a presumptive limit on the number of requests for admission that may be propounded by a party. While Rule 33(a)(1) sets a limit on the number of interrogatories a party may serve, Rule 36 places no

limit on the number of requests for admission a party may serve. Fed.R.Civ.P. 26(b)(2)(A), however, specifically grants the court the authority to "limit the number of requests [for admission] under Rule 36."

FN20. Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc ., No. 05-2164-MLB-DWB, 2007 WL 3171768, at *2 (D.Kan. Oct. 29, 2007).

FN21. See Fed.R.Civ.P. 26(b)(2)(A) ("By order or local rule, the court may also limit the number of requests [for admission] under Rule 36.").

A few cases from the District of Kansas have addressed motions to limit or objections to the number of requests for admission. In United States ex rel. Regan v. Medtronic, Inc., FN22 Magistrate Judge Humphreys granted a motion for protective order relieving the defendants from responding to 506 requests for admission. The case involved a qui tam case against a manufacturer of cardiac pacemakers for withholding warranty credits due hospitals. FN23 The court found that the requests for admission were "more than an attempt to nail down the disputed core facts of the case" and, instead, were an attempt "to pick every nit that a squad of lawyers could possibly see in it." FN24 As a result, the court entered a protective order against the annoyance, expense, and burden of responding to the requests for admission. FN25

FN22. Nos. 95-1236-MLB, 96-1309-MLB, 2000 WL 1478476, at *4 (D.Kan. July 13, 2000).

FN23. Id.

FN24. Id.

FN25. Id.

*5 In another case, Heartland Surgical Specialty Hospital, LLC v. Midwest Division, Inc.,
Magistrate Judge Bostwick overruled an ob-

jection that the number of requests for admission were excessive. In *Heartland*, multiple defendants served a total of 1,351 requests for admission on the plaintiff, 734 of which were propounded by a single defendant. Noting the case was a "multi-defendant, complicated antitrust conspiracy case," the court denied the plaintiffs' motion for a protective order against the number of requests served, because it found the number of requests was not surprising given there were 18 defendants, multiple allegations of conspiracy, and the plaintiff sought over \$121 million jointly and severally against the defendants.

FN26. 2007 WL 3171768, at *2-3.

FN27. Id.

FN28. Id.

In *Utley v. Wray*, FN29 Magistrate Judge Bostwick found that the defendants had not convinced the court that the plaintiff was abusing the use of requests for admission simply because of the number of requests that were served. The plaintiff in the medical malpractice action had served 105 requests for admission on defendant Kennett and 148 on defendant Wray. FN30 The court was cognizant of the fact that large numbers of requests for admission may be unduly burdensome, depending upon the facts and circumstances of the particular case. FN31 While noting that requests for admission can be a valuable litigation tool, it also commented that "large numbers of requests for admission may be part of a 'scorched earth' discovery strategy, designed to overwhelm an opponent, particularly where the requests are of marginal relevance."

FN29. Civ. A. No. 05-1356-MLB, 2007 WL 2703094, at *2 n. 1 (D.Kan. Sept. 14, 2007).

FN30. Id. at *2.

FN31. Id. at *2 n. 1.

FN32. Id.

In another medical malpractice case, McCloud v. Board of Geary County Commissioners, Judge Bostwick rejected a similar argument that requests for admission were objectionable in their entirety due to the large number propounded. The plaintiffs had served a collective 438 requests for admission on three defendants. The defendants argued that the requests were excessive and oppressive and so voluminous and so framed that to answer them would be unduly burdensome. FN35 The court however, found that the defendants made little or no effort to provide substantive discussion as to how or why the number of requests submitted to each defendant, upon its face, was objectionable, given that the case was a multi-defendant, medical malpractice action involving the death of a newborn. FN36

FN33. Civ. A. No. 06-1002-MLB, 2008 WL 3502436, at *3 (D.Kan. Aug. 11, 2008).

FN34. Id. at *1.

FN35. Id. at *3.

FN36. Id.

Plaintiffs argue that, unlike the Heartland case, this is an uncomplicated and straightforward case with only two plaintiffs with aligned interests and one defendant. They believe the factual issues are limited to: (1) whether or not Defendant breached the license agreement and infringed upon Layne's patent by continuing to sell its arsenic removal product without a license, and, if so, the amount of Layne's damages; (2) whether or not their contract is enforceable; and (3) whether or not Layne has misused its patent. They attempt to distinguish the facts in this case from those in Heartland by pointing out that this case has no allegations of conspiracy among multiple defendants, no antitrust allegations, and that the amount in dispute is not hundreds of millions of dollars. They argue that, while

the complicated nature of *Heartland* may have justified 734 requests for admission from one defendant, it does not support the argument that 606 requests for admission are appropriate in this case. They cite the *Medtronic* case from this District and four from other districts, in which the courts have issued protective orders against excessive requests for admission in order to protect litigants from annoyance, expense, and the burden of responding to such requests.

FN37. 2000 WL 1478476 (finding 506 requests for admission improper and excessive because they were more than an attempt to nail down the disputed core facts of the case).

FN38. See Taylor v. Great Lakes Waste Servs., No. 06-CV-12312-DT, 2007 WL 422036 (E.D.Mich. Feb. 2, 2007) (finding 297 requests for admission from one defendant in an "uncomplicated" employment discrimination action unduly burdensome); Leonard v. Univ. of Del., No. 96-360, 1997 WL 158280, at *7 (D.Del. Feb. 20, 1997) (finding 800 plus requests for admission oppressive and that an "objective attorney would be hard-pressed to quibble with the conclusion" that such requests are unreasonable and unduly burdensome"); Gannon v. United States, No. 03-6626, 2006 WL 2927639, at * 1 (E.D.Pa. Oct. 6, 2006) (finding 1407 requests for admission "grossly excessive" and therefore abusive, burdensome and oppressive); Wigler v. Elec. Data Sys. Corp., 108 F.R.D. 204, 205-06 (D.Md.1985) (finding 1664 requests for admission unjustifiable, lending itself at least to the appearance of harassment, and that answering such requests "would have taxed the powers of Hercules, even before he cleaned the Augean Stables").

*6 In response to the motion, Defendant first points out that the 606 requests for admission are in

fact two separate sets, served upon two different parties. It suggests that the Court consider the protest of excessiveness with respect to 277 requests served on Layne and 329 requests on Sen-Gupta, and not simply as to the aggregate number. It maintains that neither set of requests is excessive, given the nature of the claims and counterclaims in this case. Defendant also argues that Plaintiffs have failed to provide any evidence to support their objection that responding to 277 or 329 requests would be unduly burdensome. It contends the requests address core issues and that the number is justified, given the multiple, complex issues of patent infringement, breach of contract, and related counterclaims.

The Court finds that Plaintiffs have not shown good cause for a protective order to relieve them from responding to the 277 requests for admission served upon Layne and the 329 requests served upon SenGupta. The Court is not persuaded that this is an "uncomplicated and straightforward" case limited to only three factual issues, as Plaintiffs suggest. By their complaint, Plaintiffs have brought a claim for infringement of one patent with 15 claims, as well as a claim for breach of a licensing agreement. Defendant, moreover, has asserted nine counterclaims for breach of contract, declaration of non-infringement and patent misuse, rescission, restraint of trade under K.S.A. 50-112, unfair competition under common law, patent invalidity, and recoupment. If there is only one patent at issue with only 15 claims, Plaintiffs have accused Defendant of infringing 11 of them, relating to apparently complex chemical reactions. Given the nature of the claims and counterclaims, the Court finds the case more complex than Plaintiffs suggest and justifying a substantial number of requests, as Defendant has asserted.

The Court also notes that Plaintiffs have posed general arguments as to why responding to 277 or 329 requests would be unduly burdensome. But they fall short of specifics. First, they have cited several cases in which protection has been granted

against excessive numbers of requests for admissions. In most of them the number of requests to a party was greater than those directed here to either Plaintiff. Aside unpersuasive assertions that this case has only three basic issues, Plaintiffs simply fail to demonstrate why the Court should place a limit on the number of requests for admissions or, if it did, what that number should be. They criticize 277 and 329 as excessive. But that argument provides little help as to what should be a reasonable limit, whether it be 100, 200, 300, or some other lesser or greater number. The rules themselves do not set a specific limit. The party claiming undue burden carries a preliminary burden to show it.

Second, Plaintiffs have offered no evidence, by affidavit or otherwise, to support their suggestion that the requests do create an undue burden. Simply to label a task as unduly burdensome or oppressive does not make it so. Responses to the requests may for the most part elicit either denials or responses by which a party for lack of information neither admits nor denies them. The briefing hardly provides help to the Court in this regard.

FN39. McCloud, 2008 WL 3502436, at *3.

*7 Third, a cursory review of the proposed requests for admission leads the Court to view them, at least at this point, as reasonably clear, straightforward, and facially uncomplicated. With only limited knowledge and understanding of this case, the Court makes no ruling in this regard. But it simply notes, as to the instant motion, that on their surface the wording of the requests does not appear to support the argument that they are unduly burdensome.

B. Objection to Converse Requests for Admission

In addition to their general objection that responding to the requests is unduly burdensome and oppressive, Plaintiffs also object more specifically to some of them. They object to several of them as "converse" of each other, i.e., one request asks Plaintiffs to admit a set of facts and then another re-

quest asks to admit the negative. For example, First Request for Admission No. 12 to SenGupta asks him to admit "The Patent-In-Suit is the first disclosure of a method for synthesizing a selective adsorbent that contains dispersed particle of iron in a resin." First Request No. 14 then asks SenGupta to admit the converse: "The Patent-In-Suit is *not* the first disclosure of a method for synthesizing a selective adsorbent that contains dispersed particle of iron in a resin." Plaintiffs complain there are many "converse" requests like this, such as First Requests for Admission to Layne Nos. 8 and 9, 10 and 11, and First Requests for Admission to SenGupta Nos. 8 and 10, 9 and 11, 13 and 15.

Defendant argues that converse requests for admission are allowable and proper under Fed.R.Civ.P. 36. It also argues there is a benefit for Plaintiffs to admit or deny one set of facts and then admit or deny the opposite. Defendant contends that, under Rule 36(b), only the matter admitted is conclusively established. Therefore, its converse requests for admission are beneficial because they may elicit conclusive admissions in both directions and thereby nail down core facts of a case.

The Court finds nothing per se objectionable about "converse" requests for admission that ask a party to admit one set of facts and then to admit the negative. Plaintiffs have not negated that they ask for different admissions and, therefore, are not simply duplicative or cumulative. For example, asking SenGupta to admit "The Patent-In-Suit is the first disclosure of a method for synthesizing a selective adsorbent that contains dispersed particle of iron in a resin," is different from asking him to admit "The Patent-In-Suit is not the first disclosure of a method for synthesizing a selective adsorbent that contains dispersed particle of iron in a resin." Admitting one does not necessarily mean that the converse must always be denied. A party may admit one request and deny the other, moreover, or respond that it has insufficient information to admit or deny either request. The Court denies the motion to the extent it seeks an order to relieve Plaintiffs

from responding to "converse" requests for admission.

C. Objection to Requests for Admission That Ask One Party to Admit Facts as to Another's Party's Knowledge

*8 Plaintiffs also object to at least 75 requests for admission upon grounds they ask one party to admit or deny facts that address the knowledge of the co-party. These requests ask SenGupta to admit facts of which only Layne could know. As way of an example, First Request for Admission No. 169 asks SenGupta to admit that "Layne suspected that ResinTech infringed the Patent-In-Suit." Similarly, Request No. 173 asks SenGupta to admit that "Layne determined that ResinTech did not infringe the Patent-In-Suit." Request No. 171 asks SenGupta to admit that "Layne suspected that Lanxess infringed the Patent-In-Suit." Request No. 175 asks SenGupta to admit "Layne determined that Lanxess did not infringe the Patent-In-Suit." Plaintiffs argue that these requests are improper. They contend Defendant can receive no legitimate benefit from asking SenGupta to admit or deny facts to which he can have no special knowledge about the coplaintiff, especially when Layne is a party to the action and has been asked to admit the same requests.

Defendant maintains that these requests are proper and appropriate. It disputes that Plaintiffs have aligned interests in this case. It suggests their interests are adverse. Due to this alleged adversity, it claims it is entitled to independent responses from each Plaintiff, particularly on issues concerning the patent-in-suit. Defendant also disputes Layne's assertion that SenGupta "has no special knowledge of the facts he is asked to admit." It points out that SenGupta has a business relationship with Layne that relates to the subject matter of the patent-in-suit. Through that relationship, SenGupta may have some knowledge of what Layne knew and did.

Plaintiffs have not shown that the requests for admission, which ask one party to admit facts as to a another party's knowledge, are objectionable. Although they ask one party to admit if a co-party "suspected," or "determined" some matter, this does not make the request improper. Even had Plaintiffs convinced the Court that the requests were cumulative and duplicative because they are served on both Plaintiffs, Defendant has provided a reasonable explanation for its requests that ask Sen-Gupta to admit Layne's knowledge. The Court denies the motion to the extent that it seeks relief from responding to requests that ask a party to admit or deny facts as to another party or person's knowledge.

D. Objection to Requests for Admission That Cover Issues Obviously in Dispute

Plaintiffs also object to some of the requests, because they seek admissions about issues obviously in dispute. Requests for Admission No. 1 served on Layne and SenGupta asks them to admit that Defendant "does not make an anion exchange resin that includes particles of iron dispersed throughout a resin." Plaintiffs have alleged that Defendant's manufacture, use, and sale of an anion exchange resin that includes particles of iron dispersed throughout a resin are some of Defendant's infringing activities they have asked the Court to enjoin.

*9 Fed.R.Civ.P. 36(a)(5) appears to address this objection. It states that "party must not object solely on the ground that the request presents a genuine issue for trial." In *Audiotext Communications Network, Inc. v. U.S. Telecom, Inc.*, this Court addressed, and found without merit, an objection that the requests seek admissions of contested issues which are appropriately directed to the trier of fact: "It is not a proper ground for objection that the matter presents a genuine issue for trial; the party must admit or deny it or state the reason why it cannot be admitted or denied." FN41 The Court denies the motion to the extent that it seeks an order relieving it from responding to requests for admission that cover issues obviously in dispute.

FN40. 1995 WL 625744, at *7.

FN41. Id.

E. Objection to Requests Incorporating or Referencing Other Documents

Plaintiffs also object to Requests for Admission Nos. 49, 50, 51, 52, 53, and 54 directed to Sen-Gupta. They argue that these requests are improper because they reference and require consultation of other documents. For example, Request No. 52 asks SenGupta to admit "U.S. Patent No. 5,397,477 discloses an anion exchange resin containing particles of iron dispersed throughout the resin." Plaintiffs argue that U.S. Patent No. 5,397,477 ("the '477 patent") is not the patent at issue in this case. Citing *Sparton Corp. v. United States*, FN42 Plaintiffs argue that even if it were an issue, incorporation by reference of another document in a request for admission has generally been held improper.

FN42. 77 Fed. Cl. 10, 19 (Fed.Cl.2007).

Plaintiffs also object to Request No. 49, which asks SenGupta to admit "DeMarco et al., Arsenic removal using a polymeric/inorganic hybrid sorbent, Water Research, 37 (2003), 164-176 discloses particles of iron dispersed throughout the resin." Plaintiffs argue that what the DeMarco article discloses is not a core fact at issue in this case. Further, requiring SenGupta to track down this article, read it, and then give his opinion as to what the DeMarco article discloses is unreasonable, unduly burdensome, and improper.

In defense of its propounded requests, Defendant argues that the admissions sought as to the '477 patent and the DeMarco article will assist the parties and the Court in the Markman process. They will also support its defense of patent invalidity, which is in issue. According to Defendant, the '477 patent and the DeMarco article are relevant prior art references for claim construction and its patent invalidity defense. They are important, because they were used by the patent examiner to reject the claims of the patent-in-suit. As such, they may be used to arrive at the appropriate claim construction. Plaintiffs' admissions concerning what the differ-

ences are between these references and the alleged invention may clarify issues for the Markman process and are thus are relevant. Defendant suggests that SenGupta need not track down the DeMarco article because he is an author of the article, included in a list of publications on his web page. Unlike the *Sparton* case cited by Plaintiffs, Defendant asserts that its requests set forth each matter for which an admission is requested. Second, the requests do not ask Plaintiffs to admit multiple sentences within a document.

*10 Some courts have held that incorporation by reference of other documents in a request for admissions is improper, but may be allowed under exceptional circumstances. FN43 The underlying rationale is that "[o]rdinarily the facts admitted in an answer to a request for admissions should be ascertainable merely by examination of the request and of the answer." FN44 Furthermore, the practice of incorporating other documents by reference in a request for admission has been criticized as improper since it generates needless confusion and "unjustly casts upon the [responding party] the burden of determining at their peril what portions of the incorporated material contain relevant matters of fact which must either be admitted or denied." FN45 Even given this general disfavor of the use of incorporation by reference in requests for admission, courts have allowed a certain amount of incorporation by reference in exceptional circumstances.

FN43. United States v. Gwinn, Civ. A. No. 5:06-00267, 2008 WL 906486, at * 11 (S.D.W.Va. Mar. 31, 2008); Sparton, 77 Fed. Cl. at 18-19; United States v. Watchmakers of Switzerland Info. Ctr., Inc., 25 F.R.D. 197, 200 (S.D.N.Y.1959); Securities & Exch. Comm'n v. Micro-Moisture Controls, Inc., 21 F.R.D. 164, 166 (S.D.N.Y.1957)). See also Moore v. Rees, Civ. A. No. 06-CV-22-KKC, 2007 WL 1035013, *14 (E.D.Ky. Mar. 30, 2007).

FN44. U.S. v. Watchmakers of Switzerland

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Info. Ctr., No. Civ. 96-170, 1959 WL 67319, at *1 (S.D.N.Y. Nov. 19, 1959); Gwinn, 2008 WL 906486, at *11.
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FN45. Securities & Exch Comm'n, 21 F.R.D. at 166.

FN46. Id.

In *Sparton*, the defendant objected to the requests for admission because each request did not separately set forth each matter for which an admission was requested. One request asked the defendant "to admit each sentence contained on fifteen pages, which constitutes a minimum of seventy-five different matters." FN48 The *Sparton* court agreed with the defendant that the requests were much too complicated to answer with a simple admit or deny, because they incorporated by reference voluminous pretrial submission and asked the defendant to admit to large sections of a document containing numerous different facts. FN49 The court found that the requests therefore failed to comply with Fed.R.Civ.P. 36(a)'s requirement that each matter be separately stated.

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FN47. Sparton, 77 Fed. Cl. at 18.
FN48. Id.
FN49. Id. at 19.
FN50. Id.
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In the instant case the Court overrules the objections to the requests that refer to the '477 patent and the DeMarco article. First, it does not find the requests improper simply because they incorporate by reference the '477 patent and DeMarco article. Unlike the *Sparton* case, the requests here do not ask Plaintiffs to admit or deny large sections of incorporated documents with numerous facts. Instead, they ask Plaintiffs to admit that the '477 patent "discloses an anion exchange resin containing particles of iron dispersed throughout the resin," and that the DeMarco article "discloses particles of iron dispersed throughout the resin." SenGupta should have

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access to and be familiar with the DeMarco article, moreover, because he is one of the listed authors. Plaintiffs have not convinced the Court, moreover, that they would be unduly burdened to track down the article, read it, and then respond as to what it discloses. Finally, Defendant has persuaded the Court that both the '477 patent and DeMarco article appear relevant to the claims and defenses in this case. Defendant alleges that the '477 patent is relevant prior art references for claim construction and is relevant to its patent invalidity defense. Defendant further alleges that the '477 patent was used by the patent examiner to reject the claims of the patentin-suit. Consequently, responses about any differences between these references and the alleged invention should help to clarify issues for the Markman process. The Court denies the request to relieve Plaintiffs from responding to requests that refer to the '477 patent and the DeMarco article.

*11 Given the complexity of this litigation and the efforts of counsel to resolve their discovery disputes without motions, the Court finds that the first motion for protective order was substantially justified and that circumstances make an award of expenses unjust with regard to both motions. The Court declines to award expenses, therefore, pursuant to Fed.R.Civ.P. 26(c)(3) and 37(a)(5).

IT IS THEREFORE ORDERED THAT

Plaintiffs' Motion for Protective Order (ECF No. 66) is denied. Within 30 days of the date of this Memorandum and Order, Plaintiffs shall serve their responses to Defendant's First Set of Requests for Admission to Layne and Defendant's First Set of Requests for Admission to SenGupta.

IT IS FURTHER ORDERED THAT Plaintiffs' Second Motion for Protective Order is

denied for failure to confer. Within 45 days of the date of this Memorandum and Order, Plaintiffs shall serve their responses to Defendant's Second Set of Requests for Admission to Layne.

D.Kan.,2011.

Layne Christensen Co. v. Purolite Co. Slip Copy, 2011 WL 381611 (D.Kan.)

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Slip Copy, 2011 WL 3880830 (D.Kan.) (Cite as: 2011 WL 3880830 (D.Kan.))

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Only the Westlaw citation is currently available.

United States District Court,
D. Kansas.

LAYNE CHRISTENSEN COMPANY, and Dr.

Arup Sengupta, Plaintiffs,

BRO-TECH CORPORATION, d/b/a The Purolite Company, Defendant.

Civil Action No. 09–2381–JWL–GLR. Aug. 31, 2011.

Angela G. Harse, Joshua M. Ellwanger, Patrick D. Kuehl, Jr., Richard R. Johnson, Kansas City, MO, for Plaintiffs.

David R. Barnard, Jason C. Parks, Lathrop & Gage LLP, Kansas City, MO, Robert C. Sullivan, Jr., Brian J. Doyle, David Francescani, J. Rodrigo Fuentes, John S. Goetz, Michael T. Zoppo, Fish & Richardson PC, New York City, NY, Matthew L. Levine, Law Offices of Matthew L. Levine, New York, NY, for Defendant.

MEMORANDUM AND ORDER

GERALD L. RUSHFELT, United States Magistrate Judge.

*1 In this action for patent infringement and breach of contract, Plaintiffs Layne Christensen Company ("Layne") and Dr. Arup SenGupta ("SenGupta") allege that Defendant Bro-Tech Corporation, doing business as The Purolite Company ("Purolite"), a former licensee, infringed upon a patent for removal of arsenic from drinking water and breached the post-termination provisions of the license agreement. Under consideration are Plaintiff Layne's Motion to Compel Discovery (ECF No. 301) and Defendant's Motion for Leave to File Surreply (ECF No. 338). Pursuant to Fed.R.Civ.P. 37, Layne seeks an order compelling Defendant to fully comply with its Requests for Production 58, 75, 76, and 96. Defendant seeks leave to file a sur-reply on

grounds that Layne has raised new arguments for the first time in its reply brief. For the reasons set out below, the Court denies both motions.

I. Relevant Factual Background

On April 20, 2011, Layne served its Second Request for Production of Documents on Defendant. FNI On May 23, 2011, Defendant responded and objected to the requested discovery. FN2 On May 31 and June 1, 2011, the parties conferred about the discovery dispute. FN3 On June 10, 2011, Defendant consented to a proposed extension of time for Plaintiffs to file motion to compel fourteen days "after the parties complete the meet and confer process regarding Purolite's objections and responses to Layne's Second Set of [Requests for Production], Layne's Second Set of Interrogatories, and SenGupta's First Set of Interrogatories." FN4 That same day, rather than seeking the proposed extension of time, Layne moved to compel Defendant to fully comply with its Requests for Production 58, 75, 76, and 96. Defendant opposes the motion. Plaintiff has filed a reply brief. The motion is ripe for ruling. FN5

FN1. See Layne's Second Req. Produc. Docs. to Purolite (ECF No. 296–5).

FN2. See Def. Purolite's Resps. & Obj'ns to Layne's Second Reqs. Produc. Docs. (ECF No. 296–6).

FN3. See Mot. Compel at 1 (stating both dates); Mem. Opp'n at 1 (stating May 31, 2011); Email from Fuentes to Ellwanger of June 20, 2011, (ECF No. 326–2) (stating both dates).

FN4. See Email from Fuentes to Ellwanger of June 10, 2011, (ECF No. 319–2).

FN5. Defendant seeks to file a sur-reply because Layne purportedly asserts new arguments in its reply brief. *See* Def. Mot. Leave File Sur-Reply (ECF No. 338) at

1–2. Layne opposes the motion. See Opp'n Purolite's Mot. Leave File Surreply (ECF No. 341.) In general, the Court "summarily denies or excludes all arguments and issues first raised in reply briefs." Mike v. Dymon, Inc., No. Civ.A. 95-2405-EEO, 1996 WL 427761, at *2 (D.Kan. July 25, 1996) (citation and internal quotation marks omitted). In extraordinary circumstances, the Court may alternatively grant leave to file a sur-reply on a showing of good cause. Id. In this instance, Layne provides nothing in its reply brief to save its motion from denial. Accordingly, the Court denies the motion to file a sur-reply as unnecessary.

II. Duty to Confer

Defendant argues that the Court should deny the motion to compel because Plaintiff has failed to satisfy the conference requirements of Fed.R.Civ.P. 37(a)(1) and D. Kan. Rule 37.2.

Rule 37(a)(1) of the Federal Rules of Civil Procedure requires any motion to compel discovery to include a "certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Relatedly, D. Kan. Rule 37.2 provides:

The court will not entertain any motion to resolve a discovery dispute pursuant to Fed.R.Civ.P. 26 through 37 ... unless the attorney for the moving party has conferred or has made reasonable effort to confer with opposing counsel concerning the matter in dispute prior to the filing of the motion. Every certification required by Fed.R.Civ.P. 26(c) and 37 and this rule related to the efforts of the parties to resolve discovery or disclosure disputes must describe with particularity the steps taken by all attorneys to resolve the issues in dispute.

A "reasonable effort to confer" means more than mailing or faxing a letter to the opposing party. It requires that the parties in good faith converse, confer, compare views, consult and deliberate, or in good faith attempt to do so.

*2 "The purpose of these rules is to encourage the parties to satisfactorily resolve their discovery disputes prior to resorting to judicial intervention." FN6 As noted by this Court several years ago:

FN6. *Manning v. Gen. Motors*, 247 F.R.D. 646, 650 (D.Kan.2007).

When the dispute involves objections to requested discovery, parties do not satisfy the conference requirements simply by requesting or demanding compliance with the requests for discovery. The parties need to address and discuss the propriety of asserted objections.... They must make genuine efforts to resolve the dispute by determining precisely what the requesting party is actually seeking; what responsive documents or information the discovering party is reasonably capable of producing; and what specific, genuine objections or other issues, if any cannot be resolved without judicial intervention.

FN7. Cotracom Commodity Trading Co. v. Seaboard Corp., 189 F.R.D. 456, 459 (D.Kan.1999).

The Court identified these legal principles in a prior dispute in this case. $\stackrel{FN8}{\text{FN}8}$

FN8. See Layne Christensen Co. v. Purolite Co., No. 09–2381, 2011 WL 381611, at *2 (D.Kan. Jan. 25, 2011).

In its motion, Layne states that "the parties met and conferred in good faith via telephone regarding the subject of this motion on May 31 and June 1, 2011. Despite our efforts, the parties were notable to reach agreement in regard to the issues presented herein." It states in its reply brief that it filed the motion, because Defendant had not withdrawn objections, provided proper responses to the requests at issue, or given any indication that it would do either of those things.

that it filed the motion on the last day of fact discovery. It argues that "nothing in Local Rule 37.2 requires that a party make a good faith effort to resolve a discovery dispute and then delay filing a motion to compel for an indefinite period of time in hopes that the other side will decide to properly respond to the discovery requests at issue."

FN9. Pl. Layne's Mot. Compel Disc. (ECF No. 301) at 1.

FN10. See Pl.'s Reply Supp. Mot. Compel Disc. (ECF No. 354) ("Pl.'s Reply") at 1–2.

Despite Layne's affirmative statement that the

FN11. See id.

FN12. Id. at 2.

parties have conferred in good faith, the briefing shows otherwise. First, two telephone calls of unspecified duration do not show good faith efforts to confer as contemplated by Fed.R.Civ.P. 37(a)(1) or D. Kan. Rule 37.2. More importantly, even if those calls were of sufficient duration and substance to qualify as good faith efforts to confer, the briefing before the Court clearly shows that the efforts were incomplete when Layne filed its motion to compel. As mentioned by Layne, the conferral process does not require a party to delay filing a motion to compel once the party has made good faith efforts to resolve the discovery dispute. The concept of good faith, however, generally requires parties to refrain from filing a motion to compel when resolution efforts remain ongoing. Of course, circumstances might exist to justify filing a motion, notwithstanding ongoing efforts to resolve the dispute.

FN13. Defendant has provided an email showing that the parties were still completing the meet and confer process. *See* Email from Fuentes to Ellwanger of June 10, 2011, (ECF No. 319–2). Layne has not addressed the email or contested its contents. *See, generally*, Pl.'s Reply.

Layne essentially provides two reasons for filing its motion on June 10, 2011: (1) discovery was ending that date and (2) Defendant had not withdrawn its objections, provided proper responses to the requests at issue, or given any indication that it would do so. The first proffered reason provides no adequate reason for truncating ongoing efforts to resolve the dispute without judicial intervention, because the discovery deadline of itself poses no barrier to a later motion to compel. In other words, the passing of the discovery deadline would not necessarily moot a motion after the conclusion of ongoing resolution efforts.

*3 The second proffered reason provides no adequate basis to foreclose efforts at resolution, because demands for compliance with discovery requests do not satisfy the requirement to confer in good faith. With respect to the requests at issue in this motion, Defendant has stated that it informed Layne "that it would consider Layne's positions." Layne has not contested that statement. Given the uncontested statement, it appears that Layne moved to compel production merely because Defendant had not acceded to its demands for compliance with the discovery requests.

FN14. Mem. Opp'n at 2.

This is not a case where the movant had to file the motion to compel or risk its summary denial as untimely. The discovery dispute arose on May 23, 2011. Layne had at least thirty days from then to file its motion to compel. In this case, moreover, Layne had sought and obtained consent from Defendant to file a motion to extend the time for filing a motion to compel until fourteen days after the parties had completed the conferral process. Layne inexplicably moved to compel discovery, instead of seeking the agreed extension of time. Given the facts of this dispute, the Court cannot find that Layne engaged in good faith efforts to resolve it. Accordingly, the Court denies the motion to compel.

FN15. See D. Kan. Rule 37.1(b) (requiring

parties to file motions to compel "within 30 days of the default or service of the response, answer, or objection that is the subject of the motion, unless the court extends the time for filing such motion for good cause").

The denial of a motion to compel is typically accompanied by an award of expenses and fees incurred in opposing the motion. FN16 Such an award is not ordered, however, "if the motion was substantially justified or other circumstances make an award of expenses unjust." FN17 An award of fees or expenses is not justified under the circumstances here. The Court will simply reiterate its admonitions to counsel about their duties under the conference requirements of the Federal Rules of Civil Procedure and District of Kansas Rules. Parties are to treat the conference requirement "as a substitute for, and not simply a formalistic prerequisite to, judicial resolution of discovery disputes." FN18 Thus, "parties should confer with the same detail and candor expected in the memoranda they would file with the court on the discovery dispute." FN19 The parties in this case appear to view discovery as a playground for gamesmanship, and conference requirements merely as formalistic prerequisites for their numerous motions to compel. The Court will not hesitate to impose sanctions, when necessary or appropriate to curb abuses of the discovery process.

FN16. See Fed.R.Civ.P. 37(a)(5)(B).

FN17. See id.

FN18. First Sav. Bank, F.S.B. v. First Bank Sys., Inc., 902 F.Supp. 1356, 1364 (D.Kan.1995).

FN19. Id. at 1354-65.

IT IS THEREFORE ORDERED that Plaintiff Layne's Motion to Compel Discovery (ECF No. 301) and Defendant's Motion for Leave to File Sur-reply (ECF No. 338) are denied, as set forth herein. An award of expenses or fees is inap-

propriate under the circumstances. Each party shall bear its own attorney fees and expenses incurred in connection with the motion to compel.

D.Kan.,2011. Layne Christensen Co. v. Bro-Tech Corp. Slip Copy, 2011 WL 3880830 (D.Kan.)

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Only the Westlaw citation is currently available.

United States District Court,
D. Kansas.
HIGH POINT SARL, Plaintiff and Counterclaim
Defendant,

SPRINT NEXTEL CORP., et al., Defendants and Counterclaimants.

Civil Action No. 09–2269–CM–DJW. Sept. 28, 2011.

James D. Oliver, Scott C. Nehrbass, Toby Crouse, Foulston Siefkin LLP, Overland Park, KS, Jeffrey S. Edwards, Martin J. Black, Michael A. Fisher, Dechert, LLP, Philadelphia, PA, Jong P. Hong, Samuel P. Logan, Sarah Wager, Jonathan D. Loeb, Joshua C. Walsh–Benson, Dechert, LLP, Mountain View, CA, Michael J. Bonella, Paul B. Milcetic, Kessler Topaz Meltzer & Check, LLP, Radnor, PA, Robert D. Rhoad, Dechert, LLP, Princeton, NJ, for Plaintiff and Counterclaim Defendant.

Bart G. Van De Weghe, Eric J. Lobenfeld, Ira J. Schaefer, Theodore J. Mlynar, Aleksandra Fayer, Emily S. Deininger, Hogan Lovells U.S. LLP, New York, NY, Brent N. Coverdale, Julia D. Kitsmiller, Seyferth Blumenthal & Harris LLC, Kansas City, MO, for Defendants and Counterclaimants.

MEMORANDUM AND ORDER

DAVID J. WAXSE, United States Magistrate Judge.

*1 Pending before the Court is High Point's Motion to Compel Sprint to Provide a Supplemental Response to Interrogatory Nos. 5, 11, 17–20, 23, 24 (ECF No. 569). Pursuant to Fed.R.Civ.P. 37(a), High Point requests an order compelling Sprint to supplement its responses to Interrogatory Nos. 5, 11, 17–20, and 23. Sprint opposes the motion, arguing that its interrogatory responses are sufficient and High Point is attempting to improperly

obtain discovery outside the scope of the interrogatories. For the reasons discussed below, the motion is granted in part and denied in part.

FN1. High Point originally moved to compel a complete response to Interrogatory No. 24, but the parties advise the Court that they have since resolved their dispute as to this interrogatory.

I. BACKGROUND

High Point SARL (hereinafter, "High Point") filed this patent infringement action against Sprint Nextel Corporation; Sprint Spectrum L.P.; Sprint-Com, Inc.; Sprint Communications Company L.P.; Sprint Solutions, Inc.; APC PCS, LLP; APC Realty and Equipment Company, LLC; and STC Two LLC (collectively referred to as "Sprint"). High Point alleges that Sprint's cellular CDMA telephone networks infringe upon the four following United States patents assigned to High Point: Patent No. 5,195,090 ("the '090 patent"), entitled "Wireless Access Telephone-to-telephone Network Interface Architecture"; Patent No. 5,305,308 ("the '308 patentitled, "Wireless Access Telephoneto-telephone Network Interface Architecture"; Patent No. 5,184,347 ("the '347 patent") entitled, "Adaptive Synchronization Arrangement"; and Patent No. 5,195,091 ("the '091 patent") titled, "Adaptive Synchronization Arrangement." The patents and their foreign counterparts are directed to telecommunications equipment for a wireless cellular telephone network. High Point seeks a declaratory judgment that Sprint has infringed and continues to infringe the '090, '308, '347, and '091 patents , as well as an order permanently enjoining Sprint from infringing these patents. Sprint has asserted a counterclaim for declaratory judgment of invalidity and/or non-infringement as to each of the four patents. This case was originally filed in the United States District Court for the District of Eastern Virginia and was transferred to the District of Kansas on May 18, 2009.

Relevant to the instant motion to compel, High Point served the following interrogatories to Sprint: First Set of Interrogatories (Nos.1–12), served on February 25, 2009; Third Set of Interrogatories (Nos.17–20), served on May 24, 2010; And Fourth Set of Interrogatories (Nos.21–29), served on July 9, 2010. Sprint served its Responses to High Point's First Set of Interrogatories Nos. 3–11 on April 30, 2009.

FN2. Ex. 8 to High Point's Mem. in Supp. (ECF No. 572–9).

FN3. Ex. 2 to High Point's Mem. in Supp. (ECF No. 572–3).

FN4. Ex. 6 to High Point's Mem. in Supp. (ECF No. 572–7).

FN5. Ex. 9 to High Point's Mem. in Supp. (ECF No. 572–10).

On May 8, 2009, before this case was transferred to this Court, High Point filed a motion to compel Sprint to provide complete answers to Plaintiff's Interrogatory Nos. 3-6, 8, 10-11, and 13-16, and to produce sufficient responsive documents to several document requests (ECF No. 115). On March 2, 2010, the Court held a hearing to discuss the status of the motion. The Court granted in part and denied in part High Point's motion to compel and set a schedule for the production of documents and interrogatory answers. FN6 Per the parties' agreement, Sprint was ordered to provide by April 12, 2010 partial answers to Interrogatory Nos. 4 and 5 by selecting at least five claims from each of the four patents in suit (for a total of 20 claims) and to provide High Point with its noninfringement and invalidity contentions with respect to these claims. In addition, the Court ordered Sprint to provide answers to Interrogatory Nos. 6, 8, and 13-16 (if not yet already provided) by March 26, 2010, and to supplement its answers to Interrogatory Nos. 10-11 by April 12, 2010.

FN6. See Court's March 10, 2010 Order

(ECF No. 224).

*2 In accordance with the Court's Order, Sprint served supplemental responses to High Point's Interrogatory Nos. 6, 8, 11, 14, and 16 on March 26, 2010. It served supplemental responses to Interrogatory Nos. 4, 5 and 10 on April 12, 2010 FN8 and May 20, 2010.

FN7. Ex. 13 to High Point's Mem. in Supp. (ECF No. 572–33).

FN8. Ex. 10 to High Point's Mem. in Supp. (ECF Nos. 572–11 to 572–15).

FN9. Ex. 11 to High Point's Mem. in Supp. (ECF Nos. 572–16 to 572–28).

On August 13, 2010, Sprint served its Objection and Responses to High Point's Third Set of Interrogatories (Nos.17–20). It served its Objections and Responses to High Point's Fourth Set of Interrogatories (Nos.21–29) shortly thereafter on August 16, 2010.

FN10. Ex. 5 to High Point's Mem. in Supp. (ECF No. 572–6).

FN11. Ex. 7 to High Point's Mem. in Supp. (ECF No. 572–8).

Sprint served supplemental responses to Interrogatory Nos. 5, 11, 17–20, 23 and 24 on February 14, 2011. It further supplemented Interrogatory Nos 18 and 23 on February 25, 2011.

FN12. Ex. 12 to High Point's Mem. in Supp. (ECF Nos. 572–29 to 572–32).

FN13. Ex. I to Sprint's Opp'n. (ECF No. 617–10).

High Point's present motion to compel identifies alleged deficiencies in Sprint's responses to Interrogatory Nos. 5, 11, 17–20, and 23, and seeks an order compelling Sprint to provide additional information for those interrogatories.

II. DUTY TO CONFER

Sprint asserts that High Point failed to meet and confer in good faith regarding the discovery disputes at issue in this motion to compel, as required by Fed.R.Civ.P. 37(a)(1) and D. Kan. Rule 37.2. In particular, Sprint argues that High Point failed to confer after Sprint served supplemental interrogatory responses on February 14, 2011. After receiving Sprint's supplemental responses, High Point sent a letter to Sprint on February 23, 2011, setting out its reasons why it believed the supplemental responses were insufficient. On February 25, 2011, Sprint responded to High Point's letter and further supplemented its responses to Interrogatory Nos. 18 and 23. In that letter, Sprint stated:

To our recollection, there has been no attempt made to meet and confer concerning Sprint's objections to the Interrogatories. Please inform us of the dates and participants involved if you recall differently. Regardless, any such discussions would be stale by now and High Point certainly has not made any attempt to meet and confer regarding Sprint's February 14th supplemental responses to the Interrogatories. Many of the Interrogatories, and High Point's issues with Sprint's responses thereto, remain unclear.

FN14. Ex. I to Sprint's Opp'n. (ECF No. 617–10).

The following Monday, February 28, 2011, the deadline for filing its motion to compel, High Point filed the instant motion to compel. Afterwards, as indicated in the response and reply, the parties were able to resolve many of their disputes as to the interrogatories. Sprint argues that this shows that High Point failed to confer in good faith prior to filing its motion to compel.

High Point maintains that it met its pre-motion meet and confer obligations. It claims that it doggedly pursued Sprint's supplemental responses with no less than five letters. In addition, the parties telephonically discussed the deficiencies in Sprint's re-

sponses in October 2010, where Sprint advised of its plan to supplement its responses to some of the relevant interrogatories by November 22, 2010. After receiving no interrogatory responses in November, December 2010, or January 2011 and no explanation as to why, High Point collectively summarized the outstanding issues concerning Sprint's deficient interrogatory responses and demanded a date-certain when Sprint would supplement. On February 14, 2011, Sprint served its supplemental response to Interrogatory Nos. 5, 11, 17-20, 23 and 24. On February 23, 2011, High Sprint afforded Sprint one last opportunity to cure the remaining deficiencies. Faced with the close of fact discovery less than two months away and its deadline for filing a motion to compel. FN15 it filed its motion.

FN15. In the Court's Order extending High Point's deadline for filing its motion to compel to February 28, 2010 (ECF No. 529), the Court warned High Point that it would require "a specific showing of good cause in order to extend this deadline any further."

*3 Before a party can file a motion to compel, the Federal Rule of Civil Procedure 37 and this District's local rules require the would-be movant to confer with opposing counsel in a good faith effort to resolve the dispute without court action. Fed.R.Civ.P. 37(a)(1) requires a motion to compel to "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." This certification "must describe with particularity the steps taken by all attorneys to resolve the issues in dispute." FN16 District of Kansas Rule 37.2 further defines "reasonable effort to confer" to mean "more than mailing or faxing a letter to the opposing party." FN17 Instead, the parties must "in good faith converse, confer, compare views, consult, and deliberate or in good faith attempt to do so." FN18

FN16. D. Kan. Rule 37.2.

FN17. Id.

FN18. Id.

In the Certificate of Compliance with D. Kan. Rule 37.2 filed as part of High Point's memorandum in support of its motion, counsel for High Point certifies that he conferred in good faith with counsel for Sprint to resolve the discovery dispute at issue in the motion. The Certificate of Compliance further describes the steps taken by High Point's counsel to confer. These steps include providing Sprint with several written explanations of how the interrogatory responses were deficient and engaging in a telephonic meet and confer on October 21, 2010.

The Court has reviewed the correspondence attached to High Point's memorandum in support of its motion, including High Point's letters to Sprint dated May 25, 2010; October 5, 2010; November 24, 2010; January 11, 2011; and February 23, 2011. In each of these letters, High Point identified deficiencies in Sprint's responses to the interrogatories in dispute. These letters show that High Point repeatedly requested that Sprint supplement its responses to the interrogatories with an explanation of the deficiencies noted.

High Point's failure to engage in another round of conferring after Sprint's February 25th letter and supplementation of two interrogatories, six months after the original interrogatory responses were served, does not presumptively show that High Point failed to confer in good faith prior to filing its motion to compel. Furthermore, the parties' subsequent resolution of many of their discovery disputes after the motion was filed is not compelling proof that High Point failed to confer in good faith. The Court does agree that the fact that the parties were later able to work out many of their misunderstandings and disputes suggests that had the parties made more effort toward conferring that much of the briefing could have been avoided. Unfortu-

nately, the Court has noted that in many cases, the filing of the motion to compel provides the impetus for both the propounding party and the party objecting to the discovery to renew their efforts toward resolving the discovery dispute. Ideally, this conferring process should take place before the motion to compel is filed. In practice, the Court recognizes that sometimes a motion needs to be filed, along with the possibility of sanctions, for the parties to reevaluate their positions with respect to the discovery dispute. Although the Court agrees with Sprint that High Point could have made better efforts to confer, particularly after Sprint's February 14th and 25th supplementation, High Point has made a reasonable attempt to confer related to the interrogatories at issue prior to filing its motion to compel.

III. WAIVER OF OBJECTIONS TO CERTAIN INTERROGATORIES

*4 High Point argues that Sprint has waived all its objections to Interrogatory Nos. 17–20 and 23, because it failed to timely serve its objections to those interrogatories. High Point served its Third Set of Interrogatories (Nos.17–20) on May 24, 2010. Sprint, however, did not serve its objections and responses to the Third Set until August 13, 2010, well over the 30 days allowed for responding. High Point served its Fourth Set of Interrogatories (Nos.21–29) on July 9, 2010, to which Sprint served its objections and responses on August 16, 2010.

In its response brief, Sprint contends that it has not waived any of its objections to High Point's Third and Fourth Set of Interrogatories. After the motion was fully briefed, Sprint filed a Supplemental Memorandum (ECF No. 682) to clarify the objections on which it was relying. Sprint clarifies that it waives all its general objections to the interrogatories at issue in this motion, but continues to stand on its specific objections. The Court will therefore not consider Sprint's general objections in ruling on the interrogatories at issue in this motion.

FN19. Sprint will also not be sanctioned under Fed.R.Civ.P. 26(g) for asserting general objections to the interrogatories at issue in this motion. The Court's September 12, 2011 Memorandum and Order (ECF No. 676) found Sprint's repeated assertion of numerous, repetitive, boilerplate, incorporated-by-reference "to the extent" general objections to High Point's Fourth and Fifth Set of Interrogatories violated Rule 26(g). As Sprint has withdrawn its general objections to the interrogatories at issue in this motion (contained in High Point's First, Third, and Fourth Set of Interrogatories), no Rule 26(g) sanctions will be ordered.

Under Fed.R.Civ.P. 33(b)(2), a party responding to interrogatories "must serve its answers and any objections within 30 days after being served with the interrogatories." Rule 33(b)(4) further provides that "[a]ny grounds not stated in a timely objection is waived unless the court, for good cause, excuses the failure."

In this case, Sprint served its responses and objections to High Point's Third Set of Interrogatories on August 13, 2010, approximately 82 days after High Point served them on May 24, 2010. Although High Point failed to serve Attachment A for Interrogatory No. 19 until July 7, 2010, this does not explain why Sprint could not have served its objections to the other interrogatories that did not reference the attachment. Furthermore, even if the Court were to construe High Point's Third Set of Interrogatories as being completely served on July 7, 2010, Sprint still did not serve its objections within thirty days of that date, instead serving them on August 13, 2010. Finally, Sprint's argument that High Point acquiesced to Sprint's proposal to allow additional time to respond to the meet and confer process is not persuasive. Sprint has not offered any evidence that High Point expressly granted it an extension of its deadline for responding to the interrogatories. Sprint has not offered any showing of good cause to

excuse its failure, nor has it explained why it could not have simply filed a motion for an extension of its Rule 33(b)(2) deadline with respect to High Point's Third Set of Interrogatories. The Court therefore finds that Sprint failed to timely serve its specific objections to High Point's Third Set of Interrogatories, and they are waived pursuant to Rule 33(b)(4). The Court will therefore not consider these objections in ruling on Interrogatory Nos. 17-20 of High Point's Third Set of Interrogatories, which are at issue in the present motion to compel. With regard to High Point's Fourth Set of Interrogatories, Sprint has shown that High Point expressly granted it a one-week extension, to August 16, 2010, to respond to these interrogatories. FN20 The Court finds that Sprint timely served, and therefore preserved, its specific objections to High Point's Fourth Set of Interrogatories (Nos.21–29).

FN20. *See* Aug. 5, 2010 email, Ex. AA to Sprint's Opp'n (ECF No. 617–28).

IV. INTERROGATORIES IN DISPUTE

A. Interrogatory No. 5

*5 High Point's Interrogatory No. 5 asks Sprint "[f]or each claim of each High Point Patent that you assert is invalid, state all factual and legal bases for your assertion, including identifying all evidence and prior art upon which you rely." Sprint initially objected to Interrogatory No. 5 as "premature on the grounds that discovery in this lawsuit is in its early stages and Sprint has not yet completed its factual investigation. Sprint further object[ed] to Interrogatory No. 5 as premature to the extent it seeks expert testimony which will be provided at a later date." FN21

FN21. Sprint's April 30, 2009 Responses, Ex. 9 to High Point's Mem. in Supp. (ECF No. 572–10).

After the Court ordered Sprint to respond to the Interrogatory in March 2010, Sprint supplemented its response to Interrogatory No. 5 four times, reas-

serting its objections and responses in each supplemental response. It first supplemented its response on April 12, 2010 by providing preliminary invalidity contentions for five claims of each patent asserted by High Point. On May 20, 2010, Sprint further supplemented its response by producing supplemental preliminary invalidity contentions for the 125 claims still asserted by High Point. Finally, on February 14, 2011, Sprint served its third supplemental response by providing supplemental invalidity contentions for the twenty representative claims identified by High Point.

FN22. Ex. 10 to High Point's Mem. in Supp. (ECF No. 572–11).

FN23. Ex. 11 to High Point's Mem. in Supp. (ECF No. 572–16).

FN24. Ex. 12 to High Point's Mem. in Supp. (ECF No. 572–29).

In its response to High Point's motion to compel, Sprint argues that it has properly responded to this interrogatory. In its most recent supplemental response on February 14, 2011, it set out 196 pages of detail regarding its invalidity contentions on the twenty representative claims selected by High Point. It also provided High Point with all of the principal and material factual and legal bases for its assertion that those claims are invalid.

In its reply, High Point identifies three deficiencies with respect to Sprint's responses to Interrogatory No. 5. It claims that Sprint's responses fail to identify specific components in the figures of its prior art references, fail to identify the specific combinations of references it contends establish obviousness, and fail to adequately disclose a rationale underpinning the combination of references.

1. Specific Components in Figure References

High Point argues that Sprint's response to Interrogatory No. 5 is deficient because it fails to identify specific components in the figures of its prior art references. Throughout its interrogatory

response, specifically its preliminary invalidity charts, Sprint repeatedly cites to complex figures from references to other patents. High Point claims that this leaves it to guess as to which component in each figure reference Sprint contends meets the corresponding limitation in the High Point patents. For example, in Q27 of Sprint's Preliminary Invalidity Chart for the '090 patent, FN25 Sprint sets out that the identified claim limitation is disclosed in certain identified figures of other patents; more specifically, Figures 7-9 of U.S. Patent No. 4,866,704 ("the '704 patent"). High Point claims that without Sprint identifying which specific components in Figures 7–9 among the tangle of names, numbers, and symbols contained in the three figures, it cannot determine what portion of the figure reference contains the corresponding limitation. High Point believes that Sprint has formed opinions on how these figures relate to the claims, but refuses to disclose those opinions. Without a specific identification of the components in the prior art figure references, High Point claims that it is prejudiced because Sprint has failed to identify all principal and material facts necessary for High Point to determine the proofs required to rebut Sprint's position. It requests that the Court compel Sprint to identify the specific components within each asserted prior art reference that Sprint alleges discloses each claim limitation.

FN25. Id.

*6 Sprint claims that it has answered Interrogatory No. 5 in full by setting out the principal and material legal and factual bases for its invalidity contentions and by identifying the evidence and prior art on which it relies upon for its contentions. With respect to High Point's argument that Sprint's invalidity contentions are not sufficient because they identify figures rather than components within figures, Sprint claims that it has identified in detail the figures of the patents that it contends invalidate the patents-in-suit. In Q27 of Sprint's Preliminary Invalidity Chart for patent '090, Sprint points out that it further explained its reference to specific fig-

ures of patents with "the cited figures show the channels and packetizing and depacketizing of voice traffic ." FN26

FN26. Id.

Fed.R.Civ.P. 33(b)(3) requires that an interrogatory must, to the extent it is not objected to, "be answered separately and fully ." Under Rule 37(a)(3)(B)(iii), the party propounding the interrogatory may move for an order compelling an answer if the responding party fails to answer the interrogatory. As with all other responses to written discovery, an evasive or incomplete answer or response to an interrogatory is to be treated as a failure to answer or respond. The court has broad discretion in determining the sufficiency of an interrogatory answer. Generally, the court should apply a common-sense approach and will examine whether the answer is "responsive, full, complete and unevasive."

FN27. Fed.R.Civ.P. 37(a)(4).

FN28. *MGP Ingredients, Inc. v. Mars, Inc.*, No. 06–2318–JWL–DJW, 2007 WL 3274800, at *5 (D.Kan. Nov. 6, 2007).

FN29. *Id. See also* Fed.R.Civ.P. 37(a)(3)(B)(iii) (propounding party may move to compel under Rule 37 where a party fails to answer an interrogatory).

The Court has reviewed Q27 of Sprint's Preliminary Invalidity Chart along with Figures 7–9 of the '704 patent and agrees with High Point that, without further explanation, Sprint's reference to particular figures in other patents, it is not clear what specific portions or components of the figures contain the same voice traffic packetizing and depacketizing limitation as in the '090 patent. This, however, that does not necessarily mean that Sprint has not fully and completely answered the interrogatory. Interrogatory No. 5 ask Sprint, for each claim of each High Point Patent that you assert is invalid, to "state all factual and legal bases for your assertion,

including identifying all evidence and prior art upon which you rely." High Point really does not dispute that Sprint has provided the information sought by the interrogatory. High Point instead is requesting that Sprint be ordered to provide more specific information by having Sprint identify the specific components within each prior art reference contained in its invalidity contentions. The Court finds that this is beyond what is required by Rule 33 in answering this interrogatory. It is up to High Point, not Sprint, to obtain further clarification regarding certain aspects of the interrogatory responses that High Point does not understand. This can be done through depositions or other far less burdensome discovery devices. Obtaining clarification of a particular figure reference appears to better suited to depositions rather than requiring Sprint to further supplement by identifying specific components in all figures referenced in its 196 pages of preliminary invalidity contentions. High Point's request for an order compelling Sprint, as part of its duties in fully responding to an interrogatory under Fed.R.Civ.P. 33, to identify the components within each asserted prior art figure references in its preliminary invalidity contentions is therefore denied.

2. Specific Combinations of Prior Art References That Establish Obviousness

*7 High Point also claims that Sprint's response to Interrogatory No. 5 is deficient because it fails to identify the specific combination of prior art references that it will assert render each claim obvious. Rather, for each claim limitation Sprint states that the "limitation is disclosed, alone and/or in combination with" a group of references. It gives the following example from Q7 of Sprint's Preliminary Invalidity Chart for the '090 patent:

This limitation is also disclosed in the combination of, e.g., the '652 Patent as recited herein; the '691 Patent, Figs. 1–2; the '042 Patent, Figs. 1–2; the '377 Patent, Figs. 1–3; the '704 Patent, Fig. 8; the '919 Patent, Figs. 1–3; or the '485 Patent, Figs. 1–5, with, e.g., GSM 08.60 at 11–20; Zhang at 43–63; the '401 Patent, Figs. 1–7; the '439 Patent, Figs. 1–8; the '439 Patent, Figs. 1–9; the '439 Patent, Figs. 1

ent, Figs. 1–3; or the '832 Patent, Figs. 1–2 and 3A–B.

FN30. Ex. 12 to High Point's Mem in Supp. (ECF No. 572–29) at 29–30.

According to High Point, given the number of references cited in the alternative for each limitation, and the number of limitations, the number of possible permutations disclosed in Sprint's response is astronomical. It is thus at a real disadvantage because it cannot begin to address Sprint's actual arguments until it receives Sprint's invalidity expert report(s). This will cause High Point to suffer a real and practical harm, because under the scheduling order fact discovery will be over before Sprint provides an invalidity expert report. Thus, High Point will be unable to effectively depose Sprint's fact witnesses, who will surely include technical personnel with knowledge of prior art systems. High Point asks the Court to order Sprint to identify each combination of references that it contends renders each claim obvious.

Sprint maintains that it has answered Interrogatory No. 5 in full based upon its production of the principal and material grounds for invalidating the patents-in-suit. It argues that High Point cites no authority for its position that Sprint must identify all possible combinations of prior art references that may render the patents-in-suit obvious at this point in the case. It contents that it may properly rely on other combination of prior art identified by its expert's analysis as long as the prior art was already disclosed. It points out that the scheduling order in this case provides for final supplementation of its invalidity contentions after expert discovery is completed.

Although the District of Kansas has not adopted any local patent rules, several other Districts have issued local patent rules that require certain information be included in invalidity contentions. FN31 The Court finds these rules to be helpful in determining whether Sprint has fully answered In-

terrogatory No. 5. The specific disclosure requirements contained in these rules provides the minimum information that should be provided in a party's invalidity contentions. Eastern District of Texas Local Patent Rule 3-3 requires that invalidity contentions contain information "whether each item of prior art anticipates each asserted claim or renders it obvious. If a combination of items of prior art make a claim obvious, each such combination, and the motivation to combine such items, must be identified." Northern District of California Patent Local Rule 3-3(b) similarly requires invalidity contentions to disclose"[w]hether each item of prior art anticipates each asserted claim or renders it obvious. If obviousness is alleged, an explanation of why the prior art renders the asserted claim obvious, including an identification of any combinations of prior art showing obviousness."

FN31. Some Districts with local patent rules include the Northern and Southern Districts of California, the Eastern, Northern, and Southern Districts of Texas, the Northern District of Illinois, the Eastern District of Missouri, the Northern District of Georgia, the Western District of Pennsylvania, the District of New Jersey, the Western District of Washington, and the Eastern and Western Districts of North Carolina.

*8 From these rules, the Court concludes that at a minimum Sprint must identify the combinations of prior art showing obviousness. A review of the example cited by High Point, Q7 of Sprint's preliminary invalidity contentions for the '090 patent, reveals that Sprint has identified the "limitation is disclosed in the combination of," then listing, for example, several references to prior art. High Point is asking that Sprint further provide the *specific* combination of references that it will assert render each claim obvious.

Three cases in the Northern District of California have addressed a similar issue in the context of whether a party satisfied the disclosure requirement

contentions. In Avago Technologies General IP PTE Ltd. v. Elan Microelectronics Corp., FN33 the court held that although the approach resulted in billions of possible obviousness combinations, the defendant still satisfied Patent Local Rule 3-3(b) because it "reasonably specifie[d] the combination of prior art references that allegedly render [plaintiff's] patents obvious." Likewise, in Keithley v. The Homestore.com, Inc., FN34 the plaintiff argued that the defendants violated the local patent rule by failing to identify each combination of prior art relied upon to render the plaintiffs' patent obvious, and that the method in which defendants grouped the references can lead to "thousands or perhaps millions of possible combinations." FN35 The court accepted a list of seventy-two prior art references "which did not specify whether each reference art anticipated the patent, rendered it obvious, or both" as satisfying Local Patent Rule 3–3(b). FN36 The court, citing to Avago, found the defendants' grouping method permissible under the local rules. FN37

of the local patent rules with respect to invalidity

FN32. *MedImmune, LLC v. PDL Bio-Pharma, Inc.*, No. C 08–5590 JF (HRL), 2011 WL 61191, at *5 (N.D.Cal. Jan. 7, 2011); *Keithley v. The Homestore.com, Inc.*, 553 F.Supp.2d 1148, 1150 (N.D.Cal.2008); *Avago Technologies Gen. IP PTE Ltd. v. Elan Microelectronics Corp.*, No. C04–05385 JW (HRL), 2007 WL 951818, at *3–4 (N.D.Cal. Mar. 28, 2007).

FN33. 2007 WL 951818, at *3-4.

FN34. 553 F.Supp.2d at 1150.

FN35. Id.

FN36. Id.

FN37. Id.

FN38 In MedImmune, LLC v. PDL BioPharma, Inc., the court denied a motion to strike the

plaintiff's invalidity contentions. It found the plaintiff's grouping of more than a hundred references as prior art that "anticipated and/or made obvious" the patent at issue approached the minimum disclosure permitted under the local patent rules. The court, however, suggested that had the defendant demanded greater specificity with respect to the plaintiff's assertion of anticipation or obviousness, it well may have obtained relief.

FN38. 2011 WL 61191, at *5.

FN39. Id.

In the context of a motion to compel interrogatories, a court has looked to what information the interrogatory specifically requested to determine the level of detail the party asserting invalidity should provide. In *Dot Com Entertainment Group, Inc. v. Cyberbingo Corp.*, the plaintiff filed a motion to compel the defendant to answer interrogatories seeking all facts upon which the defendants based their allegation that plaintiff's patent is invalid and identifying every item of prior art supporting their invalidity contention. The court granted the motion to compel finding that the defendants, who were asserting the patent was invalid due to obviousness, were expected to have, even at an early stage, some good faith basis in fact and law for their invalidity defense. FN41 Notably, the court found significant that the interrogatories did not ask the defendants to explain why or how, as a matter of opinion or otherwise, such prior art establishes the invalidity of Plaintiff's patent, nor did they require defendants to advance legal argument in support of their defense or counterclaim. Rather, the court found the interrogatories simply required defendants disclose the evidentiary basis upon which such a determination may be made at trial, presumably, with the assistance of expert opinion and legal argument based on such facts. FN4

FN40. 237 F.R.D. 43, 44–45 (W.D.N.Y.2006).

FN41. Id.

FN42. Id. at 45.

*9 Analyzing these cases, a theme emerges. That theme is that a party providing preliminary invalidity contentions, either by local patent rule or by interrogatory response, is not required to provide the same level of detail that may ultimately be needed for it to support its invalidity defense. This makes sense here where experts may be necessary to provide the specificity needed to identify the specific combinations of prior art that Sprint contends show obviousness. The few cases considering whether a party has complied with local patent rules for disclosure of combinations of prior art showing obviousness have held that, even though the grouping of the prior art references could lead to thousands or millions of combinations, the disclosing party reasonably specified the combinations of prior art references that allegedly rendered the patents obvious. The Court finds this to be helpful in determining whether Sprint sufficiently answered Interrogatory No. 5 by failing to identify the specific combination of references that it will assert render each claim obvious.

At this stage of the litigation, where to the Court's knowledge no expert discovery has occurred, the Court finds that Sprint has reasonably specified the combination of prior art references that it contends will render the patents obvious, and thus fully answered Interrogatory No. 5. The Court, however, is not ruling that Sprint will never have to provide this information pursuant to its duty to supplement under Fed.R.Civ.P. 26(e). High Point's request for Sprint to provide the specific combination of references that it will assert render each claim obvious is thus premature. The March 16, 2010 Scheduling Order entered in this case provides that expert disclosures are to be determined following the ruling on Markman issues and final supplementation after expert discovery is completed. The Court will therefore deny without prejudice High Point's request for an order compelling Sprint to provide the specific combination of prior art references that it will assert render each claim obvious.

3. Rationale Underpinning the Combination of References

High Point's third identified deficiency in Sprint's response to Interrogatory No. 5 is that it fails to adequately disclose a rationale underpinning for the combination of prior art references that it contends would render the claims obvious. According to High Point, Sprint's unsubstantiated and unexplained statement that "common sense or design choice" would lead an ordinarily skilled artisan from the cited references to the claimed inventions does not adequately provide the legal bases for Sprint's obviousness defense. This conclusory statement does not articulate the reasons why it would be "common sense or a design choice" to combine particular references. High Point claims that it is prejudiced by Sprint's inadequate response because it cannot determine the proof necessary to rebut Sprint's position. It requests that the Court order Sprint to identify the reasons it contends that common sense or design choice would lead ordinarily skilled artisans from the cited references to the asserted claims.

*10 Sprint claims that it has provided the rational underpinnings for particular combinations of references. For instance, it has explained that one of ordinary skill in the art would be motivated to combine the references out of common sense or design choice. For this explanation to be developed further, it claims that expert testimony is necessary.

Under 35 U.S.C. § 103(a), a patent claim is invalid "if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art." In KSR International Co. v. Teleflex, Inc., the Supreme Court redefined the analysis for determining "whether a patent claiming the combination of elements of prior art is obvious." FN43 In order to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue, the Supreme Court instructed courts to "look to

Slip Copy, 2011 WL 4526770 (D.Kan.) (Cite as: 2011 WL 4526770 (D.Kan.))

interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art." In rejecting a rigid application of the Federal Circuit's teaching-suggestion-motivation test for obviousness, the Court observed that common sense can be one of the reasons to combine or modify prior art references to achieve the patented invention. As the Court explained:

FN43. 550 U.S. 398, 417 (2007). FN44. *Id.* at 417–18. FN45. *Id.* at 421.

When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense. In that instance the fact that a combination was obvious to try might show that it was obvious under § 103. FN46

FN46. Id.

The Court finds that although High Point may not be satisfied with Sprint's answer that one of ordinary skill in the art would be motivated to combine the references out of common sense or design choice, Sprint has fully answered Interrogatory No. 5 with regard to the asserted reasons for selecting and combining the prior art references. To the extent that expert testimony reveals more specific reasons for ordinarily skilled artisans to combine the known elements, Sprint shall seasonably supplement the interrogatory as required Fed.R.Civ.P. 26(e). High Point's request for the Court to compel Sprint to supplement Interrogatory No. 5, by identifying the reasons it contends that common sense or design choice would lead ordinarily skilled artisans from the cited references to combine the asserted claims, is denied.

B. Interrogatory No. 11

High Point's Interrogatory No. 11 asks Sprint provide the following information:

Identify all revenue received by Sprint directly or indirectly from operation of the Sprint CDMA Network (including service revenue and product sales revenue) on a monthly basis since December 1, 2002, with such revenue broken down by each category of revenue separately tracked by Sprint, including by type of traffic (e.g., voice versus data), by geographic location, and by supplier or manufacturer of the Infrastructure Products.

*11 Sprint responded that the information sought "may be ascertained or derived from the following documents: SPRINT_HP0010677, SPRINT_HP0012025-12050, SPRINT_HP0017606, SPRINT_HP0017693-17699." FN47

FN47. Ex. 13 to High Point's Mem. in Supp. (ECF No. 572–33).

Sprint claims in its response to the motion to compel that the only remaining dispute as to this interrogatory concerns High Point's newly-defined request for subscriber revenue information organized by geographic location of the CDMA wireless subscriber. It was only after filing the instant motion that High Point, for the first time, clarified that the interrogatory should be interpreted to seek Sprint's subscriber revenue from December 1, 2002 to the present organized by geographic area of the CDMA wireless subscriber. Based on that clarification, Sprint has identified two databases from which it believes reports of such information can be specially generated. Sprint states that it is in the process of preparing a special report for production in this case that will contain CDMA wireless subscriber revenue organized in relation to Sprint's 99 market areas for the period January 1, 2006 forward from its Multi-Dimensional Analysis of Performance ("MAP") database. It is also in the process of producing a report containing CDMA wireless subscriber revenue organized by Communication Service Areas for the period of December 1, 2002 through December 31, 2005 from the P2K billing system. Sprint states that its creation and production of the reports described above from the MAP and P2K systems will satisfy the last issue currently outstanding regarding Sprint's response to Interrogatory No. 11.

In its reply, High Point asks the Court to compel Sprint to supplement its response in accordance with the representations made in its opposition brief. The Court will therefore grant High Point's motion to compel as to Interrogatory No. 11. If it has not already done so, Sprint shall produce the reports identified in its response to High Point's motion to compel within thirty (30) days of the date of this Memorandum and Order.

C. Interrogatory Nos. 17, 19, and 20

High Point's Interrogatory Nos. 17 and 19 request that Sprint identify for each Infrastructure Product that was part of the Sprint CDMA Network at any time on or after December 29, 2002:

the dates of installation and of removal (if applicable) of each Infrastructure Product in the Sprint CDMA Network, each such installed Infrastructure Product being identified by supplier, manufacturer, model name, model number, version number, any internal Sprint designation including those shown on SPRINT_HP0010165–66 (including cascade identification, cell number, switch identification, BSC identification, and BSC SSEO standard name), all other known names and designations, and geographic location. (No. 17)

all hardware components installed on each Infrastructure Product in the Sprint CDMA Network, including but not limited to the hardware components identified on Attachment A, each such hardware component being identified by the hardware component name, supplier, manufacturer, version number, all other known names and designations, and dates of installation and of removal (if applicable). (No. 19)

*12 Interrogatory No. 20 asks Sprint to:

Identify each BSC, MSC, and MGW in the current Sprint CDMA Network by supplier, manufacturer, model name, model number, version number, any internal Sprint designation including those shown on SPRINT HP0010165–66 (including switch identification, BSC identification, and BSC SSEO standard name), date of installation in the network, all other known names and designations, and geographic location.

FN48. Ex. 5 to High Point's Mem. in Supp. (ECF No. 572–6).

In its February 14, 2011 supplemental response to this interrogatory, Sprint produced a spreadsheet (identified as Sprint_HP0182860) from its Asset Tracking and Logistics ("ATLAS") system. AT-LAS is the tool used by Sprint to comply with the internal control requirements of the Sarbanes-Oxley Act, as they relate to inventory and installed equipment. According to Sprint, this spreadsheet contains over 1.1 million entries and includes identifying, geographic, installation date and scrap date information for hardware components of network infrastructure products installed on Sprint's CDMA network. On March 22, 2011, Sprint produced a supplement to the spreadsheet for hardware components installed at other network infrastructure equipment sites. High Point then notified Sprint that it thought this supplement was incomplete. Sprint then produced another supplemental spreadsheet (identified as Sprint_HP0182759).

In its reply, High Point requests that the Court compel Sprint to produce the entirety of the AT-LAS database and further supplement its responses with all other responsive information currently available to Sprint. It claims that it is skeptical of

Slip Copy, 2011 WL 4526770 (D.Kan.) (Cite as: 2011 WL 4526770 (D.Kan.))

how Sprint queried its ATLAS database given that each supplemental spreadsheet contained substantial new information. To address these concerns, High Point requests that Sprint be ordered to the whole ATLAS database from which the report was generated.

Sprint states in its response brief that it has made a good faith effort to identify the records in the ATLAS database that pertain to Sprint's CDMA network. It admits that the "results do not perfectly reflect Sprint's CDMA Network but the inaccuracy is attributable to the limitations of ATLAS's organization and data content and not by any attempt by Sprint to shirk its discovery obligations." FN49 It suggests that High Point's concern's are best addressed by deposition on the topic. It considers High Point's request for produce the ATLAS database in its entirety to be an improper effort to leverage the motion to obtain discovery outside the scope of the interrogatories. It claims that the AT-LAS database in its entirety includes tremendous quantities of irrelevant information.

FN49. Sprint Opp'n (ECF No. 617) at 18.

Although Sprint waived its objections to these interrogatories by failing to timely serve them, High Point still has the burden to show that Sprint's interrogatory responses are deficient or incomplete. FN50 High Point has raised sufficient questions regarding whether Sprint's production of the spreadsheets generated from the ATLAS database includes all responsive information. It has proposed that Sprint be compelled to produce its entire AT-LAS database. Sprint's only objection to this proposal appears to be that production of the database would include large quantities of irrelevant information. This is not a persuasive argument against producing the ATLAS database. The Court will therefore grant High Point's request to compel Sprint to produce the ATLAS database in its entirety.

FN50. See Daiflon, Inc. v. Allied Chem. Corp., 534 F.2d 221, 227 (10th Cir.1976)

(party propounding interrogatory had the burden of proving the answer to their interrogatory was indeed incomplete).

*13 High Point also asks that Sprint be compelled to supplement its responses with all other responsive information currently available to Sprint. It cites to a number of other databases used by Sprint that appear to include responsive information. High Point contends that it is entitled to complete responsive information reasonably available to Sprint regardless of its source, and Sprint should not limit its information to the ATLAS database. It requests that the Court compel Sprint to further supplement its responses with all other responsive information currently available to Sprint.

In support of its argument that Sprint has attached the declaration of William H. Kitt, Jr., whose title is Manager Logistics. Mr. Kitt's declaration indicates that his current job responsibilities include overseeing the use of, updating, and maintaining the accuracy of Sprint's ATLAS system. He states in his affidavit that to the best of his knowledge, ATLAS is the Sprint database containing the most comprehensive records for hardware components of network infrastructure equipment purchased by Sprint for, or installed in, the Sprint CDMA Network prior to July 2007.

FN51. Kitt Decl., Ex. C to Sprint's Opp'n (ECF No. 617–4) at 4.

As the Court is ordering Sprint to produce its ATLAS database to High Point and Sprint has offered the statement of Mr. Kitt indicating that the ATLAS database is the most comprehensive database for the records sought, this should provide sufficient assurances to High Point that Sprint has produced all information responsive to Interrogatory Nos. 17, 19, and 20. High Point's request for Sprint to further supplement its responses with all other responsive information currently available to Sprint is denied.

D. Interrogatory No. 18

High Point's Interrogatory No. 18 asks for the following information from Sprint:

For each Infrastructure Product that was part of the Sprint CDMA Network at any time on or after December 29, 2002, identify all software and software updates installed on or loaded onto each Infrastructure Product in the Sprint CDMA Network, including the software name, supplier, manufacturer, version number, revision number, all other known names and designations, and installation date or date of update.

High Point requests in its reply that the Court order Sprint to supplement its response to include the entire time period specified or provide supplemental declaration including the assurances and information requested. It contends that Sprint's response to Interrogatory No. 18 is inadequate because it does not provide complete software update information for each software vendor for the entire period requested.

Sprint states that it has already provided the approximate installation dates of software loads on the infrastructure equipment in Sprint's CDMA network going back several years. This information, provided as attachments to the declarations of Sprint Network Developer Patrick Himmelberg (for Alcatel-Lucent equipment), Network Planner Dwight Patton (for Nortel equipment), and Telecom Design Engineer Rajveen Narendran (for Motorola and Samsung equipment), FN52 reflects Sprint's current knowledge of the software loads and corresponding installation dates. Sprint acknowledges that it was not able to provide identifying and installation date information for the full period sought for the following: LGP software loads 2002 through 2004; 5E and ECP software loads in 2002 and 2003; BTS software loads in 2002 through 2004; Nortel MTX, BSC, or BTS software loads in 2002 and 2003; Motorola BTS and BSC software loads in 2002 and 2003; the Samsung BTS and BSC software loads in 2002. Sprint explains it was not able to provide this information because (1) none of the engineers previously responsible for deployment of the missing information are currently employed by Sprint, (2) Sprint does not maintain any current records containing installation dates for that software, and (3) it could not locate historical archive that would contain installation dates for that software.

FN52. Exs. O, P, and Q to Sprint's Opp'n (ECF Nos. 617–16, 617–17, and 617–18).

*14 High Point claims that Sprint's declarations and arguments do not sufficiently confirm that Sprint adequately searched for the requested information. According to High Point, Sprint's refusal to make minor revisions to its declarations and to provide a small amount of additional information to alleviate High Point's concerns is highly suggestive that these concerns are well-founded.

High Point first takes issue with the wording of the declarations provided by Sprint. In particular, it focuses on the word "certain" in paragraph 4 of each declaration: "Attached hereto as Attachment 1 is a true and correct copy of a table identifying *certain* software loads and their approximate installation dates...." FN53 High Point claims that this suggests ambiguity, and therefore it has requested assurances from Sprint that the tables referenced in the declaration reflects a complete record of Sprint's knowledge regarding the relevant software loads.

FN53. *Id.* at 3 (emphasis added).

On this issue, High Point fails to convince the Court that Sprint's usage of the word "certain" in the declarations suggests that Sprint is knowingly withholding or omitting relevant information on software loads. Sprint has stated in its opposition brief that the software load information provided to High Point "reflects Sprint's current knowledge of the software loads and corresponding installation dates." FN54

FN54. Sprint's Opp'n (ECF No. 617) at 21.

High Point also criticizes the declarants offered by Sprint, arguing that none of them declare themselves to be Sprint's most knowledgeable person concerning its records of software loaded onto its CDMA infrastructure products. It further points out that none of these three declarants were identified by Sprint as knowledgeable about the technical documentation topics specified in High Point's Rule 30(b)(6) notice.

The Court does not find that High Point's concerns with Sprint's declarants are sufficient to establish that Sprint has failed to fully answer this interrogatory. High Point is seeking assurances from Sprint regarding the completeness of Sprint's responses to this interrogatory. In an attempt to provide those assurances, Sprint produced declarations from three of its employees along with tables identifying software loads and their approximate installation dates. Based upon the declarant's job title, years of experiences, and job responsibilities, each declarant appears to be a knowledgeable source regarding the particular category of information sought. For example, Sprint Network Developer Patrick Himmelberg states in his declaration that he has worked for one or more of Sprint-related entities for approximately 10 years and is "one of the Sprint engineers currently responsible for Alcatel-Lucent network infrastructure equipment in Sprint's network for processing CDMA calls to and from CDMA-enabled handsets." FN55 The table attached to his declaration identifies software loads and their approximate installation dates for Alcatel-Lucent LGP, 5E, ECP and BTS equipment. Mr. Himmelberg would appear to be a reasonable and reliable source for this information, even if he did not state that he was the most knowledgeable person, nor was he designated by Sprint as one of its Rule 30(b)(6) representatives.

FN55. Himmelberg Decl., Ex. O to Sprint's Opp'n (ECF No. 617–16).

*15 Sprint has acknowledged that it has not provided responsive information for the entire time period specified in Interrogatory No. 18. It has explained why it cannot locate the information and provided declarations from persons who would be a

reasonable and reliable source. High Point's concerns with Sprint's declarants and the words used in the declarations do not justify the further information and assurances sought. High Point's request for the Court to compel Sprint to include the entire time period specified or provide supplemental declaration including the assurances and information requested is denied.

E. Interrogatory No. 23

Interrogatory No. 23 seeks information about Sprint's purchase of infrastructure products in its CDMA network. In its response to the interrogatory, Sprint produced two spreadsheets pursuant to Fed.R.Civ.P. 33(d). Sprint thereafter identified additional documents that it had already produced and identified to High Point that provided purchase information for Samsung, Alcatel–Lucent, and Nortel products. According to Sprint, High Point's only remaining complaint with Sprint's response to Interrogatory No. 23 is that the identified purchase order reports do no provide consistent-looking descriptive information for the listed equipment.

In its reply, High Point disagrees with Sprint's characterization of the remaining disputes with regard to this interrogatory. It continues to assert that Sprint's response to Interrogatory No. 23 remains incomplete because Sprint has not identified a "key" to decipher the data produced under Fed.R.Civ.P. 33(d). It requests that the Court compel Sprint to supplement its response to include a "key" explaining the entries of the data it has identified in its response. It provides the following lone example of why it needs the a key. In the document identified as SPRINT_HP0012048, FN56 High Point claims that it cannot determine the meaning of the entries, e.g., CAIRVA0601, LOCGCASC04, LOCLNJRB01, in the "Ship To" field of the spreadsheet. For the example provided, the Court finds High Point's request for a "key" to enable it to decipher the data produced and identified in Sprint's purchase order spreadsheets is reasonable and necessary to equalize the burden of deriving or ascertaining the answer under Fed.R.Civ.P. 33(d). Slip Copy, 2011 WL 4526770 (D.Kan.) (Cite as: 2011 WL 4526770 (D.Kan.))

High Point's request for a key explaining the entries of the data it has identified in its response is therefore granted in part and denied in part. Sprint shall produce a key for the "Ship to" column on the document produced as SPRINT_HP0012048. As High Point has not identified any other columns of the purchase order spreadsheets as needing a key to be able to discern the information provided, the Court will only order Sprint to provide a key for this column.

FN56. Ex. F to Sprint's Opp'n (ECF No. 617–7) at 14–16.

V. EXPENSES

Under Fed.R.Civ.P. 37(a)(5)(C), if a motion to compel is granted in part and denied in part, the court may, after providing an opportunity to be heard, "apportion the reasonable expenses for the motion." Neither party requests fees or expenses in connection with this motion to compel. Upon review of the briefing, the Court concludes that each party should bear its own fees and expenses.

VI. SUMMARY OF RULINGS

*16 High Point has made sufficient attempts to confer related to the interrogatories at issue prior to filing its motion to compel. Sprint has waived its specific objections to High Point's Third Set of Interrogatories (Nos.17–20), but not the Fourth Set of Interrogatories, by failing to serve timely objections to them, as required by Fed.R.Civ.P. 33(b)(2).

For **Interrogatory No. 5**, High Point's requests for an order compelling Sprint to (1) identify the components within each asserted prior art figure references in its preliminary invalidity contentions, (2) provide the specific combination of prior art references that it will assert render each claim obvious, and (3) identify the reasons it contends that common sense or design choice would lead ordinarily skilled artisans from the cited references to the asserted claims are denied. Sprint, however, is reminded that it is under a continuing duty to seasonably supplement its interrogatory answers pursuant to Fed.R.Civ.P. 26(e).

As to **Interrogatory No. 11,** High Point's request to compel Sprint to supplement its response in accordance with the representations made in its opposition brief is granted. if it has not already done so, Sprint shall produce the reports identified in its response to High Point's motion to compel.

For **Interrogatory Nos. 17, 19 and 20,** High Point's request to compel Sprint to produce the AT-LAS database in its entirely is granted. High Point's request for Sprint to further supplement its responses with all other responsive information currently available to Sprint is denied.

As to **Interrogatory No. 18,** High Point's request for the Court to compel Sprint to include the entire time period specified or provide supplemental declaration including the assurances and information requested is denied.

Finally, for **Interrogatory No. 23**, High Point's request for a key explaining the entries of the data it has identified in its response is granted in part and denied in part. Sprint shall produce a "key" for the "Ship to" column on the document produced as SPRINT_HP0012048.

IT IS THEREFORE ORDERED that High Point's Motion to Compel Sprint to Provide a Supplemental Response to Interrogatory Nos. 5, 11, 17–20, 23, 24 (ECF No. 569) is granted in part and denied in part. Sprint shall produce the reports identified in its response brief for Interrogatory No. 11, its ATLAS database, and "a key" for the "Ship to" column of SPRINT_HP0012048 within thirty (30) days of the date of this Memorandum and Order.

IT IS FURTHER ORDERED that each party shall bear its own fees and costs related to the motion.

IT IS SO ORDERED.

D.Kan.,2011. High Point SARL v. Sprint Nextel Corp. Slip Copy, 2011 WL 4526770 (D.Kan.) (Cite as: 2011 WL 4526770 (D.Kan.))

Slip Copy, 2011 WL 4526770 (D.Kan.)

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Not Reported in F.Supp.2d, 2007 WL 3120447 (D.Kan.) (Cite as: 2007 WL 3120447 (D.Kan.))

Only the Westlaw citation is currently available.

United States District Court, D. Kansas. Carol Beth TILLEY, Plaintiff,

v.

EQUIFAX INFORMATION SERVICES, LLC, et al., Defendants.

No. 06-2304-JAR. Oct. 24, 2007.

Gregory M. Dennis, Kent T. Perry & Co., L.C., Overland Park, KS, for Plaintiff.

Jennifer J. Chapin, Polsinelli Shalton Flanigan Suelthaus, P.C., James S. Kreamer, Baker, Sterchi, Cowden & Rice, L.L.C., Danne W. Webb, Miller Law Firm, P.C., Carlton D. Callenbach, Ryan C. Fowler, Darren K. Sharp, Armstrong Teasdale LLP, Kansas City, MO, Michael D. Douglas, King & Spalding LLP, Michael A. Sexton, Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, Atlanta, GA, Bryan E. Mouber, Baker, Sterchi, Cowden & Rice, L.L.C., Overland Park, KS, Matthew Kasey Ratliff, Paul W. Sheldon, Strasburger & Price, L.L.P., Frisco, TX, James H. Hall, II, Jones Day, Houston, TX, Chad M. Pinson, James W. Bristow, Van Harold Beckwith, Baker Botts, LLP, Dallas, TX, for Defendants.

ORDER

JAMES P. O'HARA, U.S. Magistrate Judge.

*1 This case comes before the court on the motion (doc.158) of the plaintiff, Carol Beth Tilley, to compel defendant Global Payments, Inc. ("Global") to direct division general counsel David L. Green to answer certain deposition questions he was instructed not to answer on the basis of attorney-client privilege; alternatively, plaintiff requests that Global be required to produce another witness pursuant to Fed.R.Civ.P. 30(b)(6) to answer the questions in issue. Global has filed a response (doc. 162), and

the plaintiff has replied (doc. 163). As indicated during the final pretrial conference on October 23, 2007, the court finds that Global's attorney-client privilege objections are invalid and therefore overruled. It follows that the instant motion is granted.

This case was brought by plaintiff under the Federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, et seq., and state defamation law. Highly summarized, plaintiff alleges that Global published defamatory statements about her to other defendants who recently settled out of this case, i.e., CSC, Equifax, TransUnion, and Experian. Significantly Mr. Green, as Global's in-house counsel, was directly involved in the underlying controversy, and he communicated with plaintiff during September and October 2005. Indeed, Global listed Mr. Green as a witness in its initial disclosures pursuant to Fed.R.Civ.P. 26(a)(1). During the telephonic deposition of Mr. Green, he was instructed not to answer certain questions on the grounds of privilege.

It is well-established that the deposition of opposing counsel should be limited to circumstances where the party seeking to take the deposition has shown that: (1) no means exist to obtain the information other than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case. However, the issue before the court is not whether plaintiff should be allowed to depose Mr. Green, but rather the scope of the deposition inquiry. The court concurs with plaintiff that the ruling in *United Phosphorous Ltd. v. Midland Fumigant, Inc.*, FN2 is instructive to the issues now before the court in this case. In United Phosphorous, the court found that counsel, who had participated in events underlying the claims, possessed relevant, nonprivileged information crucial to the preparation of the case, and therefore, could be questioned regarding such information. FN3

FN1. Thiessen v. General Electric Capital

Corp., 267 F.3d 1095, 1112 (10th Cir.2001)(citing Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir.1986)).

FN2. 164 F.R.D. 245 (D.Kan.1995).

FN3. Id. at 250.

Since this action arises mainly under a federal statutory scheme, federal law provides the rule of decision as to application of the attorney-client privilege. Under federal common law, the essential elements of the attorney-client privilege are: (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except if the protection be waived.

FN4. *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1368-69 (10th Cir.1997).

FN5. Marten v. Yellow Freight Sys., Inc., No. 96-2013, 1998 WL 13244, at * 5 (D.Kan. Jan. 6, 1998) (quoting Great Plains Mut. Ins. Co. v. Mutual Reinsurance Bureau, 150 F.R.D. 193, 196 n. 4 (D.Kan .1993)).

*2 The privilege "protects confidential communications by a client to an attorney made in order to obtain legal assistance from the attorney in his capacity as a legal advisor." The privilege also protects advice given by the lawyer in the course of representing the client. The privilege protects communications with in-house counsel as well as outside attorneys. The privilege, however, "is to be extended no more broadly than necessary to effectuate its purpose." FN9

FN6. *Marten*, 1998 WL 13244, at *6 (quoting *Jones v. Boeing Co.*, 163 F.R.D. 15, 17 (D.Kan.1995)).

FN7. *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981).

FN8. Upjohn, 449 U.S. at 390.

FN9. *Great Plains Mut. Ins. Co.*, 150 F.R.D. at 196 (citation omitted).

"Not every communication between an attorney and client is privileged, only confidential communications which involve the requesting or giving of legal advice." FN10 "The focal point of the protection afforded by the attorney-client privilege lies with 'communications' between attorneys and their clients." FN11 And, although the privilege protects disclosure of substantive communication between attorney and client, "it does not protect disclosure of the underlying facts by those who communicated with the attorney." FN12 There must be a connection between "the subject of the communication and the rendering of legal advice" for the attorney-client privilege to shield the communication from disclosure. Legal advice must predominate for the communication to be protected. The privilege does not apply where the legal advice is merely incidental to business advice. FN15

FN10. Burton v. R.J. Reynolds Tobacco Co., 175 F.R.D. 321, 327 (D.Kan.1997) (citing Fisher v. United States, 425 U.S. 391, 403 (1976); United States v. Olano, 62 F.3d 1180 (9th Cir.1995)).

FN11. *IMC Chemicals, Inc. v. Niro, Inc.*, No. 98-2348, 2000 WL 1466495, at *8-9 (D.Kan. July 19, 2000) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981)).

FN12. *Id*.

FN13. Burton, 175 F.R.D. at 328.

FN14. *Burton v. R.J. Reynolds Tobacco Co.*, *Inc.*, 170 F.R.D. 481, 484 (D.Kan.1997)(citing *Leonen v. Johns-Manville*, 135 F.R.D. 94 (D.N.J.1990)).

FN15. *Id.* (citing *In re Brand Name Prescription Drugs Antitrust Litig.*, 1995 WL 354268 (N.D.III.1995)).

In this case, as mentioned above, Mr. Green was directly involved in the events underlying plaintiff's claims. Therefore, Mr. Green obviously possesses relevant and nonprivileged information. In her reply brief, plaintiff states that she has not asked and does not intend to ask Mr. Green to disclose what advice he gave top Global management. Nor does plaintiff want to ask Mr. Green to disclose what questions were asked of him by Global officials seeking advice from him.

The transcript of Mr. Green's deposition reflects that the questions and objections in issue are as follows:

Q. What, if anything did you do after the phone call from Carol Tilley on the 26th of September, 2005 to look into this matter?

Mr. Sexton: Object as to privilege. Instruct not to answer.

FN16. Deposition of David Lawrence Green at 19, lines 18-22.

Q. How did you determine whether on the 26th of September, the 27th of September, that Global Payments has no record of Carol Tilley having paid this alleged debt.

Mr. Sexton: Object as to privilege. Instruct not to answer. A 30(b)(6) witness will be available in two weeks to answer questions as to Global's knowledge. FN17

FN17. Id. at 22, lines 22-25; 23, lines 1-4.

...

Q. Now you indicated that you're involved with merchant accounts for Global Payments in the United States, is that correct?

A. Generally, yes.

Q. And how is Global payments able to look up and retrieve information on merchants that they have?

Mr. Sexton: Object as to privilege. Any information Mr. Green would know about that would have been received in the course of being a lawyer for Global Payments and, therefore, I instruct not to answer.

FN18. Id. at 31, lines 13-25; 32, line 1.

*3 ...

Q. Is the only way to look up information on merchants through a Social Security number?

Mr. Sexton: Objection, privileged. Instruct not to answer. Wrong witness.

FN19. Id. at 32, lines 4-8.

•••

Q. Is the only way to look up information is with a merchant account number?

 $Mr.\ Sexton:$ Objection, foundation. Privileged. FN20 Instruct not to answer.

FN20. Id. at 32, lines 11-15.

...

Q. And where-you were able to gather that information from Global Payments' information?

A. Yes.

Q. And what information did you gather on Carol Tilley?

Mr. Sexton: Objection, privileged. What the business people told Mr. Green as counsel is protected and I, therefore, instruct the witness

not to answer the question. FN21

FN21. Id. at 37, lines 23-25; 38, lines 1-8.

...

Q. And my question is just focusing in on Carol Tilley. What information were you able to obtain on Carol Tilley from Global's information that they had on her?

Mr. Sexton: Object to the question as phrased because it calls for privileged material. Instruct not to answer.

FN22. Id. at 38, lines 14-21.

Based on the limited record presented, viewed in light of the well-established privilege precedent cited in this order, the court finds that defendant has failed to show that any of the above-described questions posed of Mr. Green during his deposition impede on Global's attorney-client privilege. Although Global implicitly suggests that, purely because of Mr. Green's position as in-house counsel he need not answer any questions that go one millimeter past his discussions with plaintiff, that simply is not the law. Global has made no appreciable effort to justify its very aggressive litigation position in light of the well-established precedent cited above. Global's objections therefore are overruled. Defense counsel shall produce Mr. Green for further testimony consistent with this order by November 21, 2007. The court expects plaintiff's counsel to continue asking questions of Mr. Green in a manner so as to avoid infringing upon Global's attorney-client privilege. And finally, as discussed on the record during the pretrial conference, the continued deposition of Mr. Green, as contemplated by this order, is *not* intended by the court and shall not be construed as suffering upon Global a broad subject matter waiver of attorney-client privilege with regard to plaintiff's claims.

In consideration of the foregoing,

IT IS HEREBY ORDERED that plaintiff's motion to compel (doc.158) is granted.

D.Kan.,2007.

Tilley v. Equifax Information Services, LLC Not Reported in F.Supp.2d, 2007 WL 3120447 (D.Kan.)

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476 F.3d 462, 67 Fed.R.Serv.3d 457

(Cite as: 476 F.3d 462)

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United States Court of Appeals,
Seventh Circuit.
Erik REDWOOD and Jude Redwood, PlaintiffsAppellants, Cross-Appellees,

ν.

Elizabeth DOBSON and Harvey Cato Welch, Defendants-Appellees,

and

Marvin Ira Gerstein, Defendant-Appellee, Cross-Appellant.

> Nos. 05-4324, 06-1165. Argued Jan. 8, 2007. Decided Feb. 7, 2007.

Background: The accused in a state criminal proceeding brought action under § 1983 and the civil rights conspiracy statute against the Assistant State's Attorney, the complainant, complainant's attorney in related civil litigation, and other defendants, claiming that defendants violated the First Amendment by discriminating against the accused's religion and that defendants conspired to maintain a malicious prosecution. The United States District Court for the Central District of Illinois, Michael P. McCuskey, Chief Judge, granted summary judgment in favor of defendants, denied the accused's motion for sanctions in discovery, and denied motion for attorney fees filed by complainant's attorney. Accused appealed, and complainant's attorney cross-appealed.

Holdings: The Court of Appeals, Easterbrook, Chief Judge, held that:

- (1) Assistant State's Attorney was entitled to absolute immunity;
- (2) Assistant State's Attorney's ordinary contact with complainant during the state criminal prosecution could not be viewed as a conspiracy;
- (3) conduct of complainant's attorney in offering to seek dismissal of criminal charges against accused in exchange for settlement of civil matter did not

provide basis for civil rights claim against complainant's attorney;

- (4) three attorneys would be censured, and one attorney would be admonished, for conduct unbecoming a member of the bar, which occurred during deposition taken in the case; and
- (5) district court acted within its discretion in denying the motion for attorney fees.

Affirmed; three attorneys censured; one attorney admonished.

West Headnotes

[1] Civil Rights 78 🖘 1376(9)

78 Civil Rights

78III Federal Remedies in General

78k1372 Privilege or Immunity; Good Faith and Probable Cause

78k1376 Government Agencies and Of-

ficers

78k1376(9) k. Attorney General and prosecuting attorneys. Most Cited Cases

Conspiracy 91 € 13

91 Conspiracy

91I Civil Liability

 $91I(\mbox{\sc A})$ Acts Constituting Conspiracy and Liability Therefor

91k12 Persons Liable

91k13 k. In general. Most Cited Cases

Assistant State's Attorney who decided to commence criminal prosecution against the accused, and who decided to put police officer before the grand jury as a summary witness rather than to call the complainant, was entitled to absolute immunity, in civil rights action brought by the accused alleging a conspiracy to maintain a malicious prosecution and discrimination against his religion in violation of the First Amendment. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. §§ 1983, 1985.

[2] Civil Rights 78 🖘 1037

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General

78k1030 Acts or Conduct Causing Deprivation

78k1037 k. Malicious prosecution and false imprisonment; mental health commitments. Most Cited Cases

Civil Rights 78 € 1088(4)

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General

78k1088 Police, Investigative, or Law Enforcement Activities

78k1088(4) k. Arrest and detention. Most Cited Cases

Malicious prosecution is not a constitutional tort independent of complaints about wrongful arrest and detention.

[3] Civil Rights 78 🖘 1375

78 Civil Rights

78III Federal Remedies in General

78k1372 Privilege or Immunity; Good Faith and Probable Cause

78k1375 k. Attorneys, jurors, and witnesses; public defenders. Most Cited Cases

Conspiracy 91 € 13

91 Conspiracy

91I Civil Liability

91I(A) Acts Constituting Conspiracy and Liability Therefor

91k12 Persons Liable

91k13 k. In general. Most Cited Cases

Complainant in state criminal prosecution lacked absolute immunity, in civil rights action brought by the accused alleging a conspiracy to maintain a malicious prosecution and discrimination against his religion in violation of the First Amendment. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. §§ 1983, 1985.

[4] Conspiracy 91 \$\infty\$7.5(2)

91 Conspiracy

91I Civil Liability

91I(A) Acts Constituting Conspiracy and Liability Therefor

91k7.5 Conspiracy to Interfere with Civil Rights

91k7.5(2) k. Rights or privileges involved. Most Cited Cases

Assistant State's Attorney's ordinary contact with the complaining witness in state criminal prosecution could not be viewed as a conspiracy under civil rights conspiracy statute, for purposes of civil rights suit brought by the accused, absent any indication that the prosecutor and complainant had a joint objective and pursued it through unlawful acts. 42 U.S.C.A. § 1985.

[5] Conspiracy 91 \$\infty\$ 7.5(1)

91 Conspiracy

91I Civil Liability

91I(A) Acts Constituting Conspiracy and Liability Therefor

91k7.5 Conspiracy to Interfere with Civil

Rights

91k7.5(1) k. In general. Most Cited

Cases

The minimum ingredient of a conspiracy, for purposes of civil rights conspiracy statute, is an agreement to commit some future unlawful act in pursuit of a joint objective. 42 U.S.C.A. § 1985.

[6] Civil Rights 78 🖘 1088(5)

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General

78k1088 Police, Investigative, or Law Enforcement Activities

78k1088(5) k. Criminal prosecutions.

Most Cited Cases

Civil Rights 78 \$\infty 1326(10)

78 Civil Rights

78III Federal Remedies in General
78k1323 Color of Law
78k1326 Particular Cases and Contexts
78k1326(10) k. Attorneys and witnesses. Most Cited Cases

Attorney's conduct in offering to contact Assistant State's Attorney and ask her to dismiss a criminal charge against the accused, as part of settlement in civil case between the accused and the attorney's client, did not violate any rule of federal law and, thus, did not provide basis for accused to sue the attorney under civil rights statutes, even though the accused called the attorney's offer "extortion"; so far as § 1983 and the Constitution were concerned, criminal charges could be dismissed in order to facilitate civil settlement. 42 U.S.C.A. §§ 1983, 1985.

[7] Federal Civil Procedure 170A \$\infty\$ 1381

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties

170AX(C) Depositions of Parties and Others Pending Action

> 170AX(C)3 Examination in General 170Ak1381 k. In general. Most Cited

Cases

When deposing attorney asked witness questions that appeared to have the purpose of harassment, the appropriate response, as set out in rule of civil procedure, was for witness's attorney to halt the deposition and apply for a protective order, and the rule did not permit witness's attorney to simply instruct the witness to remain silent. Fed.Rules Civ.Proc.Rule 30(d), 28 U.S.C.A.

[8] Federal Civil Procedure 170A \$\infty\$ 1451

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others Pending Action

170AX(C)6 Failure to Appear or Testify; Sanctions

170Ak1451 k. In general. Most Cited

Cases

Deposing attorney, the attorney-witness being deposed, and the witness's attorney would each be censured, as discovery sanction, for conduct unbecoming a member of the bar, which occurred during deposition taken in civil rights lawsuit; deposing attorney asked questions with no apparent relevance, such as whether the witness had ever engaged in homosexual conduct and whether witness had been ordered to obtain psychiatric counseling as part of state bar disciplinary proceedings, witness's attorney violated procedural rule in repeatedly instructing witness not to answer, witness feigned an inability to remember and purported ignorance of ordinary words, and mutual enmity did not excuse the breakdown of decorum that occurred at the deposition. Fed.Rules Civ.Proc.Rules 30(d), 37(a)(4), (b)(2), 28 U.S.C.A.

[9] Federal Civil Procedure 170A \$\infty\$1451

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others Pending Action

170AX(C)6 Failure to Appear or Testify; Sanctions

170Ak1451 k. In general. Most Cited

Cases

Attorney representing one of defendants in civil rights case would be admonished, as a discovery sanction, for conduct unbecoming a member of the bar, which occurred during deposition taken by plaintiff's attorney of one of the other defendants in the suit; the admonished attorney had improperly joined objections by the witness's attorney instructing the witness not to answer, which violated procedural rule, and the admonished attorney inaccurately stated to deposing attorney that the questions asked at the deposition had to meet the standard of the rules of evidence. Fed.Rules Civ.Proc.Rules 30(d), 37(a)(4), (b)(2), 28 U.S.C.A.

[10] Federal Civil Procedure 170A \$\infty\$ 2840

170A Federal Civil Procedure 170AXX Sanctions

170AXX(F) On Appeal 170Ak2837 Grounds 170Ak2840 k. Frivolousness; particular cases. Most Cited Cases

While plaintiffs' principal arguments on the merits of their claims were frivolous, on appeal from summary judgment granted in favor of defendants in civil rights case, sanctions for frivolous appeal were not warranted, where plaintiffs' appeal was successful with respect to the issue of discovery sanctions, and fault was widely distributed in the case, F.R.A.P.Rule 38, 28 U.S.C.A.

[11] Civil Rights 78 🖘 1484

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees

78k1484 k. Awards to defendants; frivolous, vexatious, or meritless claims. Most Cited Cases

District court acted within its discretion, in § 1983 action brought by an accused for alleged violation of his constitutional rights in connection with state criminal prosecution, in refusing to award attorney fees to one of the defendants, where the state-law claims presented by accused and his wife were not as fatuous as those arising under federal law. 42 U.S.C.A. §§ 1983, 1988.

[12] Civil Rights 78 🖘 1482

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1482 k. Results of litigation; prevailing parties. Most Cited Cases

Civil Rights 78 € 1484

78 Civil Rights
78 III Federal Remedies in General
78 k1477 Attorney Fees
78 k1484 k. Awards to defendants; frivolous, vexatious, or meritless claims. Most Cited Cases

The legal rule created by civil rights statute allowing prevailing party to recover attorney fees is asymmetric in plaintiffs' favor. 42 U.S.C.A. § 1988.

[13] Federal Courts 170B \$\infty\$=830

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk830 k. Costs, attorney fees and other allowances. Most Cited Cases

Appellate review of the district court's decision on whether to award attorney fees in civil rights case is deferential. 42 U.S.C.A. § 1988.

[14] Federal Civil Procedure 170A @ 2847

170A Federal Civil Procedure
170AXX Sanctions
170AXX(F) On Appeal
170Ak2847 k. Type and amount of sanction. Most Cited Cases

Appellants' and appellee's conduct in filing frivolous motions to strike portions of the opposing side's appellate briefs was not appropriate grounds for monetary sanctions, where the motions were filed before issuance of Court of Appeals' decision holding that motions to strike portions of brief were pointless and warranted sanction.

[15] Federal Courts 170B \$\infty\$ 713

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(H) Briefs
170Bk713 k. Statement of case or facts;
appendix. Most Cited Cases

Federal Courts 170B € 715

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(H) Briefs
170Bk715 k. Defects, objections and amendments; striking briefs. Most Cited Cases
A brief, or reply brief, is the appropriate means

to contest the accuracy of the other side's statement of facts in their briefs on appeal, rather than filing a motion to strike portions of brief.

*465 Judith M. Redwood (argued), Redwood Law Office, St. Joseph, IL, Charles L. Danner, Peoria, IL, for Plaintiff-Appellee.

Jude Redwood, pro se.

James C. Kearns, Keith B. Hill (argued), Heyl, Royster, Voelker & Allen, Urbana, IL, Roger B. Webber (argued), Beckett & Webber, Urbana, IL, David N. Rumley, Urbana, IL, for Defendant-Appellant.

Before EASTERBROOK, Chief Judge, and ROVN-ER and WOOD, Circuit Judges.

EASTERBROOK, Chief Judge.

This is a grudge match. Harvey Cato Welch represented Erik Redwood in a criminal prosecution for battery. Redwood was convicted and maintains that Welch is at fault. Redwood wants Welch to sign an affidavit confessing that he supplied ineffective assistance; he believes that with such an affidavit he could have his criminal record expunged. Welch, who believes that his legal work met professional standards, has refused to fall on his sword for Redwood's benefit. Redwood has retaliated by insulting Welch in public, calling him, among other things, a "shoe-shine boy." Redwood is white and Welch black; Welch believes that this phrase, when spoken to an adult, is a racial slur.

During October 1998 a scuffle occurred after Redwood again called Welch a "shoe-shine boy." Redwood filed a battery suit in state court; Welch filed a defamation counterclaim and asked the State's Attorney to prosecute Redwood for inciting a breach of the peace. Erik Redwood was represented in that litigation by attorney Jude Redwood, his wife, who also is a plaintiff in the federal suit. Elizabeth Dobson, an Assistant State's Attorney, decided that Erik Redwood had committed a hate

crime by using a demeaning term that led to a physical confrontation. Officer Troy Phillips of the Urbana Police Department presented the evidence to the grand jury, which returned an indictment. Attorney Marvin Gerstein, representing Welch in the civil litigation, later wrote to Jude Redwood suggesting that, if the litigation could be resolved amicably, he would try to persuade Dobson to dismiss the criminal charge. The Redwoods rejected that offer. The civil case went to trial; while the jury was deliberating, the parties reached a settlement. Meanwhile the criminal prosecution had been dismissed on the ground that the state's hate-crime law does not apply to speech that does not threaten immediate physical injury. See People v. Redwood, 335 Ill.App.3d 189, 269 Ill.Dec. 288, 780 N.E.2d 760 (4th Dist.2002).

While the prosecutor's appeal in the criminal prosecution was pending, the Redwoods filed this federal action against Dobson, Welch, Gerstein, Phillips, and the City of Urbana. The complaint, signed by Jude Redwood as counsel (she is also a plaintiff, alleging loss of consortium) accuses the five defendants of violating the first amendment by discriminating against Erik Redwood's religion (which, he maintains, leads him to "teach truth and righteousness to all persons, including defendant Harvey Welch", a curious euphemism for personal insults) and of conspiracy to *466 maintain a malicious prosecution. These acts are alleged to violate 42 U.S.C. § 1983 and § 1985, though the Redwoods have never tried to explain why a state may not apply a rule that is neutral with respect to the speaker's religion. See Employment Division v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990); cf. Wisconsin v. Mitchell, 508 U.S. 476, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993). The complaint also presents several claims under state law.

Urbana settled the litigation for nuisance value. After extended discovery, the district court granted summary judgment for the four other defendants. Phillips prevailed as a result of the absolute immunity that applies to witnesses in criminal pro-

ceedings. See *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). The Redwoods have abandoned their claims against him but appeal with respect to the remaining three defendants. The Redwoods also appeal from the denial of their motion for sanctions in discovery, Gerstein has filed a cross-appeal to protest the district court's denial of his motion for attorneys' fees, and both sides ask us to award sanctions for what they call frivolous arguments in this court.

[1][2] Dobson, Welch, and Gerstein are right to label most of the Redwoods' appellate arguments as frivolous. "Malicious prosecution" is not a constitutional tort independent of complaints about wrongful arrest and detention, and Erik Redwood was never placed in custody. See Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994); Newsome v. McCabe, 256 F.3d 747 (7th Cir.2001). Dobson's decision to commence a criminal prosecution is covered by absolute immunity. See Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). Although the plaintiffs insist that Dobson is being sued for administrative rather than prosecutorial duties, the only "administrative" act about which they complain is her decision to put Phillips before the grand jury as a summary witness, rather than to call Welch. That's precisely the kind of prosecutorial decision that immunity protects. Unlike activity of the sort at issue in Buckley v. Fitzsimmons, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993)-such as a prosecutor's personal conduct of an interrogation, or a pre-litigation search or seizure-the choice of witnesses to present is part of the prosecutorial function and cannot independently violate anyone's rights (as a search or seizure might do).

[3][4][5] As the complainant in the criminal prosecution, Welch lacks absolute immunity, see *Kalina v. Fletcher*, 522 U.S. 118, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997), but he's not a state actor and so can't be liable under § 1983 in the first place. That is why the Redwoods invoke 42 U.S.C. § 1985(3), which covers conspiracies between pub-

lic and private actors. But where's the conspiracy? Plaintiffs treat all contact between prosecutors and complaining witnesses as "conspiracy." The minimum ingredient of a conspiracy, however, is an agreement to commit some future unlawful act in pursuit of a joint objective. See United States v. Lechuga, 994 F.2d 346 (7th Cir.1993) (en banc). The record in this case would not permit reasonable jurors to conclude that Welch and Dobson had a joint objective, let alone that they agreed to pursue it through unlawful acts. Welch complained to the prosecutor, seeking an end to what he deemed racist harassment; Dobson acted as she conceived the public interest to require. Dobson had no reason to do any favors for Welch and received nothing (except this lawsuit) in return for her official actions. No prosecutor handles a case in an isolation tank. Discussions with victims, witnesses, and police are common. If these *467 ordinary acts amount to "conspiracy" to violate the Constitution, then immunities will be worthless and both witnesses and prosecutors would be induced to remain passive rather than enforce the criminal law vigorously.

[6] Then there is Gerstein, whose only role was to represent Welch in the tort litigation, and neither § 1983 nor § 1985(3) applies to that private activity. The Redwoods believe that Gerstein acted unethically by offering to contact Dobson and ask her to dismiss the criminal charge as part of a settlement. Whether or not that step was appropriate as a matter of legal ethics in Illinois, it does not violate any rule of federal law-for so far as § 1983 and the Constitution are concerned, criminal charges may be dismissed in order to facilitate civil settlement. See Newton v. Rumery, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987). Calling the offer "extortion," as the plaintiffs do, does not make it so, as *Newton* demonstrates. See also *Dye v. Wargo*, 253 F.3d 296 (7th Cir.2001). If Gerstein acted wrongfully in suggesting a global resolution, the Redwoods' remedy lay in the state court handling the civil litigation (to which they never complained), or the Attorney Registration and Discip-

linary Commission of Illinois (to which they did), rather than in a federal lawsuit.

The only reason why the Redwoods' appeal is not wholly frivolous is that the district court dismissed the state-law claims on the merits rather than relinquishing supplemental jurisdiction. A court that resolves all federal claims before trial normally should dismiss supplemental claims without prejudice. 28 U.S.C. § 1367(c)(3). That both sides have allowed animosity to get the better of legal judgment, however, implies the wisdom of bringing the contretemps to a conclusion in a single forum. The state-law claims were not complex. On appeal, the Redwoods treat them as replays of the federal claims, and their principal argument is that a jury could find a conspiracy among the defendants. As we have rejected that argument with respect to the federal theories, it fails for state-law theories as well.

A profusion of motions and cross-motions for sanctions-and the conduct underlying some of these motions-demonstrates the extent to which counsel have allowed personal distaste to displace dispassionate legal analysis. Most depositions are taken without judicial supervision. Witnesses often want to avoid giving answers, and questioning may probe sensitive or emotionally fraught subjects, so unless counsel maintain professional detachment decorum can break down. That happened here; the results were ugly.

Gerstein's deposition was taken by Charles L. Danner on behalf of both Redwoods, though Jude Redwood attended and sometimes acted as counsel in addition to her role as a plaintiff. Gerstein's counsel was Roger Webber, though Gerstein himself peppered the transcript with legal arguments. The deposition began badly when Danner spent the first 30 pages or so of the transcript exploring Gerstein's criminal record-mostly vehicular violations. Danner made no effort to explain how these questions could lead to admissible evidence, and they got under Gerstein's skin. After Gerstein spontaneously refused to answer some of the questions

(remarking "That's none of your business"), Webber began instructing Gerstein not to answer.

[7] Webber gave no reason beyond his declaration that the questions were designed to harass rather than obtain information-which may well have been their point, but Fed.R.Civ.P. 30(d) specifies how harassment is to be handled. Counsel for the witness may halt the deposition and apply for a protective order, see *468Rule 30(d)(4), but must not instruct the witness to remain silent. "Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)." Fed.R.Civ.P. 30(d)(1). Webber violated this rule repeatedly by telling Gerstein not to answer yet never presenting a motion for a protective order. The provocation was clear, but so was Webber's violation.

Danner then turned to Gerstein's troubles with the state bar, another topic whose relevance (or ability to lead to relevant evidence) has never been explained. Gerstein was censured for misconduct in 1991 and suspended for a month in 2002. Although the reasons are matters of public record, Danner demanded that Gerstein confess them in the deposition; Gerstein professed inability to remember, and when Danner inquired whether Gerstein had been ordered to obtain psychiatric counseling or angermanagement therapy, Webber again told him not to answer. Richard Klaus, representing Dobson, opined that Danner had committed a misdemeanor under Illinois law by asking questions about Gerstein's mental health.

What happened next must be set out in full to be believed:

Q [by Danner]. Mr. Gerstein, have you ever engaged in homosexual conduct?

MR. WEBBER: Objection, relevance.

MR. KLAUS: I join.

MR. WEBBER: I believe it violates Rule 30, and I'm instructing him not to answer the question.

A. I'm not answering the question.

MR. KLAUS: I join the objection.

Q. Mr. Gerstein, are you involved in any type of homosexual clique with any other defendants in this action?

MR. WEBBER: Same objection. Same instruction.

MR. KLAUS: I join the objection.

Gerstein would have been entitled to stalk out of the room. Webber justifiably could have called off the deposition and applied for a protective order (plus sanctions). Fed.R.Civ.P. 26(c), 30(d)(3), (4). Instead he told Gerstein not to answer, which was untenable as no claim of privilege had been advanced.

After a brief recess, Gerstein acquired "amnesia" and started playing word games.

Q. During the last recess that we had that we just reconvened from, did you consult with your attorney concerning this deposition?

Instead of asserting the attorney-client privilege, a genuine reason not to answer (though perhaps consultation would have violated an order that the deposition be conducted without such conferences), Gerstein played dumb.

- A. I don't understand the question.
- Q. We just had a recess.
- A. I understand that.
- Q. Do you understand that? During that recess period, did you take that time to consult with your attorney regarding this deposition?

- A. I don't know what you mean by the word consult.
- Q. Did you speak with your attorney regarding this deposition?
- A. I don't think so. I don't know.
- Q. Do you know how-did you write anything to your attorney during that recess?
- A. Write anything?
- Q. Correct.
- *469 A. No.
- Q. Did you speak with your attorney during that recess?
- A. I had words with my attorney. We exchanged a conversation.
- Q. Were those conversations-or strike that. Did any of the comments in that conversation or those conversations refer to any aspect of this deposition?

A. I can't recall.

The deposition fills a further 98 pages of transcript, unedifying to the end. At one point Danner asked whether the secretary who had typed the letter in which Gerstein offered to ask Dobson to dismiss the criminal prosecution was married; Webber instructed Gerstein not to answer. Danner asked whether the secretary had children; before Webber could leap in, Gerstein replied that she did. What this-indeed, what most of Danner's questions-had to do with the legal proceeding against Gerstein is unfathomable. Plaintiffs say that Gerstein once gave Danner "the finger," and though the transcript does not reflect that gesture the proceedings were heated enough that this could well have happened. (Gerstein does not deny this accusation; a video tape of the deposition was made, but we have not consulted it.)

[8][9] Danner's conduct of this deposition was shameful-not as bad as the insult-riddled performance by Joe Jamail that incensed the Supreme Court of Delaware, see *Paramount Communications Inc.*v. *QVC Network Inc.*, 637 A.2d 34, 52-57 (Del.1994), but far below the standards to which lawyers must adhere. Gerstein, Webber, and Klaus were goaded, but their responses-feigned inability to remember, purported ignorance of ordinary words (the "consult" episode was not the only one), and instructions not to respond that neither shielded a privilege nor supplied time to apply for a protective order-were unprofessional and violated the Federal Rules of Civil Procedure as well as the ethical rules that govern legal practice.

At one point, after Jude Redwood said that, because this was a deposition rather than a trial, Danner was entitled to fish for evidence whether or not the answers would be admissible, Klaus replied: "[T]his is not a discovery deposition. There's no such distinction or dichotomy under the federal rules. Everything that is asked here must meet the standard of the federal rules of evidence." Klaus either did not know, or did not care, that discovery may be used to elicit information that will lead to relevant evidence; each question and answer need not be one that could be one that would itself be proper at trial. But Danner's questions had ventured so far beyond the pale that overstatement on the other side was inevitable.

When the Redwoods sought sanctions in the district court, the judge declared that everyone had behaved badly and that, because Danner was the greater offender, no sanctions would be appropriate. The district judge remarked that it was "ludicrous" for the Redwoods to argue that lawyers may not instruct witnesses not to answer. Given Rule 30(d)(1), however, the Redwoods had (and have) a meritorious position on this issue.

Mutual enmity does not excuse the breakdown of decorum that occurred at Gerstein's deposition. Instead of declaring a pox on both houses, the district court should have used its authority to maintain standards of civility and professionalism. It is precisely when animosity runs high that playing by the rules is vital. Rules of legal procedure are designed to defuse, or at least channel into set forms, the heated feelings that accompany much litigation. Because depositions take place in law offices rather than courtrooms, adherence to *470 professional standards is vital, for the judge has no direct means of control.

Sanctions are in order, but they need not be monetary. See Fed.R.Civ.P. 30(d)(3), 37(a)(4), (b)(2). Because the arguments pro and con have been fully ventilated in this court, and none of the attorneys has asked for a hearing under Fed. R.App. P. 46(c), we see no need to drag out this controversy with a remand. Attorneys Danner, Gerstein, and Webber are censured for conduct unbecoming a member of the bar; attorney Klaus is admonished. (We differentiate in this way because a censure is the more opprobrious label, see In re Charges of Judicial Misconduct, 404 F.3d 688, 695-96 (2d Cir.2005), and Klaus's misconduct is substantially less serious than that of the other lawyers.) Any repetition of this performance, in any court within this circuit, will lead to sterner sanctions, including suspension or disbarment.

[10] We are not done with motions and crossmotions for sanctions and other relief. Gerstein has asked us to penalize the Redwoods under Fed. R.App. P. 38 for taking a frivolous appeal. As we have explained, the Redwoods' principal arguments on the merits were frivolous, but their appeal with respect to discovery sanctions has been successful. Although we have the discretion to award Rule 38 sanctions issue-by-issue as well as appealby-appeal, we elect not to do so because fault is widely distributed. It should be plain to the Redwoods from what we have said, however, that any effort to resume this spite contest under another legal theory would not be in their financial interest (and would jeopardize Jude Redwood's future ability to practice law in federal court).

[11] In addition to asking for sanctions in re-

sponse to the Redwoods' appeal, Gerstein filed a cross-appeal to contest the district court's order denying his motion in that forum for attorneys' fees under 42 U.S.C. § 1988. Such awards in a defendant's favor are proper only if the suit is frivolous or vexatious. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). The Redwoods responded with a Rule 38 motion of their own, asking us to award attorneys' fees in their favor on the theory that Gerstein's cross-appeal is frivolous. In a small concession, Gerstein has not asked for fees under Rule 38 on the theory that the Redwoods' Rule 38 motion is frivolous; perhaps he fears infinite regress.

[12][13] Any defendant who seeks fees under § 1988 for the cost of defense in the district court has a tough row to hoe, for two reasons-the legal rule that § 1988 creates is asymmetric in plaintiffs' favor, see Hughes v. Rowe, 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980), and appellate review of the district court's decision is deferential. See Webb v. Board of Education, 471 U.S. 234, 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985). The district judge did not abuse his discretion. As we've mentioned, the statelaw claims presented under the supplemental jurisdiction were not as fatuous as those arising under federal law. Although we would have been inclined to award sanctions were the decision ours to make, it is not; discretion includes the freedom to take decisions other than the appellate tribunal's first preference.

Finally, we have multiple motions to strike portions of the opposing side's briefs. The Redwoods asked this court to strike parts, if not all, of the statement of facts in Dobson's brief; Gerstein asked us to strike parts, if not all, of the statement of facts in the Redwoods' brief. Each motion-which was deferred by a motions panel to the hearing on the merits-asserts that statements in the other side's *471 brief misrepresent the record. And each motion was met, first, with a defense of the brief's accuracy and, second, with a motion under Rule 38 for sanctions for filing a frivolous motion to strike.

[14][15] Each of the motions to strike was indeed frivolous, for the reasons given in Custom Vehicles, Inc. v. Forest River, Inc., 464 F.3d 725 (2006) (Easterbrook, J., in chambers). The Federal Rules of Appellate Procedure provide a means to contest the accuracy of the other side's statement of facts: that means is a brief (or reply brief, if the contested statement appears in the appellee's brief), not a motion to strike. Motions to strike sentences or sections out of briefs waste everyone's time. They go to a motions panel, which does not know (and cannot efficiently learn) which statements are accurate depictions of the record and, if erroneous, whether the error is legally material. If the motions panel defers decision to the hearing on the merits, as was done here, then the motion does nothing except increase the amount of reading the merits panel must do, effectively giving each side argument on top of the word limit set by Fed. R.App. P. 32. Motions to strike words, sentences, or sections out of briefs serve no purpose except to aggravate the opponent-and though that may have been the goal here, this goal is not one the judicial system will help any litigant achieve. Motions to strike disserve the interest of judicial economy. The aggravation comes at an unacceptable cost in judicial time.

These motions were filed before the opinion in *Custom Vehicles* issued, however, and therefore are not appropriate grounds of monetary sanctions. (It is too late to count the motion toward the allowable length of the brief, the sanction adopted in *Custom Vehicles*.) Future motions of this kind will not be so charitably received.

The judgment is affirmed. Attorneys Charles L. Danner, Marvin Ira Gerstein, and Roger B. Webber are censured for conduct unbecoming a member of the bar, and attorney Richard Klaus is admonished for conduct unbecoming a member of the bar.

C.A.7 (III.),2007. Redwood v. Dobson 476 F.3d 462, 67 Fed.R.Serv.3d 457

END OF DOCUMENT



260 F.3d 183

(Cite as: 260 F.3d 183)

United States Court of Appeals, Third Circuit.

In re CENDANT CORP., (formerly known as CUC International, Inc.) Cendant Capital I.

Lester A. Goldstein, on behalf of himself and all others similarly situated; Welch & Forbes Inc., an institutional investment manager, individually and on behalf of all others similarly situated,

v.

Walter A. Forbes; Cosmo Corigliano; Anne M. Pember; Merrill Lynch & Co.; Chase Securities Inc.; Henry R. Silverman,

v.

Ernst & Young; Cendant Membership Services, Inc.; Casper Sabatino; Steven P. Speaks; Kevin T. Kearney; Mary Sattler; Howard Sirota, Appellant.

> No. 99-5485. Argued Dec. 15, 2000. Filed Aug. 8, 2001.

Attorney who was an unsuccessful bidder for lead counsel position in consolidated securities litigation class actions appealed fine imposed by the United States District Court for the District of New Jersey, William H. Walls, J., for violating confidentiality order regarding bid auction process. The Court of Appeals, Fuentes, Circuit Judge, held that: (1) bids were judicial records, and thus subject to common law right to access; (2) closure of bidding auction was not warranted; (3) sealing of bids contravened purpose of the Private Securities Litigation Reform Act (PSLRA); (4) confidentiality order was improperly issued; and (5) District Court had no factual predicate to impose sanctions against attorney.

Vacated.

West Headnotes

[1] Federal Courts 170B \$\infty\$ 755

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)1 In General

170Bk754 Review Dependent on

Whether Questions Are of Law or of Fact

170Bk755 k. Particular cases. Most

Cited Cases

What constitutes the proper legal standard for granting a confidentiality order is an issue of law, over which Courts of Appeals exercise plenary review.

[2] Federal Courts 170B \$\infty\$ 523

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(A) In General

170Bk523 k. Supervisory jurisdiction in

general. Most Cited Cases

Courts of Appeals have an inherent supervisory power, arising out of rule governing discovery, to fashion and clarify rules for district courts governing the district courts' power to enter confidentiality orders at the discovery stage or any other stage of litigation. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

[3] Records 326 🖘 32

326 Records

326II Public Access

326II(A) In General

326k32 k. Court records. Most Cited

Cases

There exists, in both criminal and civil cases, a common law public right of access to judicial proceedings and records.

[4] \$\infty\$1951.12

170A Federal Civil Procedure

170AXV Trial

170AXV(A) In General

170Ak1951.12 k. Access to proceedings;

public trial. Most Cited Cases

(Formerly 170Ak1951)

Records 326 € 32

326 Records 326II Public Access 326II(A) In General 326k32 k. Court records. Most Cited Cases

The public's right of access extends beyond simply the ability to attend open court proceedings; rather, it envisions a pervasive common law right to inspect and copy public records and documents, including judicial records and documents.

[5] Records 326 © 32

326 Records 326II Public Access 326II(A) In General 326k32 k. Court records. Most Cited Cases

Whether or not a document or record is subject to the right of access to court proceedings and records turns on whether that item is considered to be a "judicial record;" status of a document as a "judicial record," in turn, depends on whether a document has been filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings.

[6] Records 326 🖘 32

326 Records 326II Public Access 326II(A) In General

326k32 k. Court records. Most Cited

Cases

For purposes of determining whether a document is subject to right of access as a "judicial record," while filing clearly establishes such status, a document may still be construed as a judicial record, absent filing, if a court interprets or enforces the terms of that document, or requires that it be submitted to the court under seal.

[7] Records 326 🖘 32

326 Records 326II Public Access 326II(A) In General 326k32 k. Court records. Most Cited

Cases

Bids submitted to District Court for purpose of selecting lead counsel to represent plaintiffs in securities litigation class action were "judicial records," and thus were subject to common law right to access, even though District Court kept bids sealed and issued confidentiality order regarding bidding process, where District Court ordered attorneys to submit bids, appointed lead counsel after in camera review of bids, and issued order, itself a public document, summarizing content of bids in encoded chart.

[8] ©~~1951.12

170A Federal Civil Procedure 170AXV Trial 170AXV(A) In General 170Ak1951.12 k. Access to proceedings; public trial. Most Cited Cases (Formerly 170Ak1951)

Records 326 € 32

326 Records 326II Public Access 326II(A) In General 326k32 k. Court records. Most Cited

Cases

The practical effect of the right to access doctrine is to create an independent right for the public to view proceedings and to inspect judicial records.

[9] \$\infty\$1951.12

170A Federal Civil Procedure 170AXV Trial 170AXV(A) In General 170Ak1951.12 k. Access to proceedings; public trial. Most Cited Cases (Formerly 170Ak1951)

Records 326 S 32

326 Records
326II Public Access
326II(A) In General
326k32 k. Court records. Most Cited

Cases

Protecting the right to access in class actions promotes class members' confidence in the administration of the case, diminishes the possibility that injustice, incompetence, perjury, or fraud will be perpetrated against those class members who have some stake in the case but are not at the forefront of the litigation, and provides class members with a more complete understanding of the class action process and a better perception of its fairness.

[10] Records 326 🖘 32

326 Records
326II Public Access
326II(A) In General
326k32 k. Court records. Most Cited

Cases

Presumption that bids used to appoint lead counsel in class action litigation and that the in camera proceeding to review those bids would be part of an open process, accessible to the public, disallows the routine and perfunctory closing of judicial records, since throwing a veil of secrecy over selection process deprives class members of opportunity to exercise effective control in the selection of class counsel.

[11] 🖘 1951.12

170A Federal Civil Procedure
170AXV Trial
170AXV(A) In General
170Ak1951.12 k. Access to proceedings;
public trial. Most Cited Cases
(Formerly 170Ak1951)

Records 326 @==32

326 Records
326II Public Access
326II(A) In General

326k32 k. Court records. Most Cited

Cases

The presumption of public access to court proceedings and records may be rebutted.

[12] Records 326 🖘 32

326 Records
326II Public Access
326II(A) In General
326k32 k. Court records. Most Cited
Cases

Every court has supervisory power over its own records and files, and access may be denied where court files might have become a vehicle for improper purposes.

[13] ©~~1951.12

170A Federal Civil Procedure
170AXV Trial
170AXV(A) In General
170Ak1951.12 k. Access to proceedings;
public trial. Most Cited Cases
(Formerly 170Ak1951)

Records 326 € 32

326 Records
326II Public Access
326II(A) In General
326k32 k. Court records. Most Cited

Cases

In order to override the common law right of access to court proceedings and records, the party seeking the closure of a hearing or the sealing of part of the judicial record bears the burden of showing that the material is the kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure.

[14] \$\infty\$1951.12

170A Federal Civil Procedure 170AXV Trial 170AXV(A) In General

170Ak1951.12 k. Access to proceedings; public trial. Most Cited Cases (Formerly 170Ak1951)

Records 326 € 32

326 Records
326 II Public Access
326 II(A) In General

326k32 k. Court records. Most Cited

Cases

In delineating the injury to be prevented by closure of court proceedings or sealing of judicial records, specificity is essential, and thus broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient to warrant such closure or sealing.

[15] \$\infty\$ 1951.12

170A Federal Civil Procedure
170AXV Trial
170AXV(A) In General
170Ak1951.12 k. Access to proceedings;
public trial. Most Cited Cases
(Formerly 170Ak1951)

Records 326 5 32

326 Records
326II Public Access
326II(A) In General

326k32 k. Court records. Most Cited

Cases

The strong common law presumption of access to court proceedings and records must be balanced against the factors militating against access, and the burden is on the party who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption.

[16] © 1951.12

170A Federal Civil Procedure
170AXV Trial
170AXV(A) In General
170Ak1951.12 k. Access to proceedings;

public trial. Most Cited Cases (Formerly 170Ak1951)

Records 326 € 32

326 Records
326II Public Access
326II(A) In General
326k32 k. Court records, Most Cited

Cases

Because of the peculiar posture of class actions whereby some members of the public are also parties to the class action, and because of the importance of selection of lead counsel to class action plaintiffs, the test for overriding the right of access to court proceedings and records, involving balancing of common law presumption of access against factors militating against access, should be applied in class actions with particular strictness.

[17] @ 1951.12

170A Federal Civil Procedure
170AXV Trial
170AXV(A) In General
170Ak1951.12 k. Access to proceedings;
public trial. Most Cited Cases
(Formerly 170Ak1951)

Records 326 € 32

326 Records
326II Public Access
326II(A) In General
326k32 k. Court records. Most Cited

Cases

The "compelling countervailing interests" standard is most appropriate test for overriding the right of access to court proceedings and records, involving balancing of common law presumption of access against factors militating against access, with the additional requirement of specific findings which may or may not require a hearing.

[18] Records 326 \$\infty\$=32

326 Records

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326II Public Access
326II(A) In General
326k32 k. Court records. Most Cited
Cases
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Closure of bidding auction used by District Court in appointing lead counsel to class in securities litigation was not warranted, because disclosure of class counsel's bids and compensation arrangements benefited class; unlike usual attorney-client situation, class members did not participate in negotiations by which a part of their claim was bargained away, class members were not in a position to monitor lead counsel, and rule required attorney to communicate basis of fee to client. ABA Rules of Prof.Conduct, Rule 1.5(b).

[19] Records 326 🖘 32

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326 Records
326II Public Access
326II(A) In General
326k32 k. Court records. Most Cited
Cases
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Even if a sealing order was proper at the time when it was initially imposed, the sealing order must be lifted at the earliest possible moment when the reasons for sealing no longer obtain; continued sealing must be based on current evidence to show how public dissemination of the pertinent materials now would cause harm.

[20] Federal Civil Procedure 170A 🖘 187

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170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
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170Ak187 k. Stockholders, investors, and depositors. Most Cited Cases

Purpose of Private Securities Litigation Reform Act (PSLRA) provision requiring that subject to court approval, the most adequate plaintiff retains class counsel is to permit the plaintiff to choose counsel rather than have counsel choose the plaintiff. Securities Act of 1933, § 27(a)(3)(B)(iv),

as amended, 15 U.S.C.A. § 77z-1(a)(3)(B)(iv).

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[21] Records 326 $\infty$=32
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326 Records
326II Public Access
326II(A) In General
326k32 k. Court records. Most Cited
Cases
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Sealing of bids in auction for appointment of lead counsel in securities litigation class action contravened purpose of the Private Securities Litigation Reform Act (PSLRA), where Congress' clear intent in enacting the PSLRA was to transfer control of securities class actions from attorneys to class members through a properly selected lead plaintiff, but instead of allowing class plaintiffs to choose lead counsel, District Court selected class counsel through a sealed bidding process which had yet to be unsealed; sealing bids enabled counsel to litigate with a view toward ensuring payment for their services without sufficient regard to their clients' compensation. Securities Act of 1933, § 27(a)(3)(B)(iv), as amended, 15 U.S.C.A. § 77z-1(a)(3)(B)(iv).

[22] Records 326 🖘 32

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326 Records
326II Public Access
326II(A) In General
326k32 k. Court records. Most Cited
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Cases

Notwithstanding the limitations on sealing of judicial records created by the common law public right to access, the balancing of the factors for and against access is a decision committed to the discretion of the district court, although it is not generally accorded the narrow review reserved for discretionary decisions based on first-hand observations.

[23] Records 326 🖘 32

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326 Records
326 II Public Access
326 II(A) In General
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326k32 k. Court records. Most Cited

Cases

A district court's discretion in balancing the factors for and against access to judicial records must be exercised properly, because the issuance of a confidentiality order overriding the common law right of public access contemplates an analytical process.

[24] Records 326 🖘 32

326 Records

326II Public Access

326II(A) In General

326k32 k. Court records. Most Cited

Cases

District Court abused its discretion in sealing bids in auction for appointment of lead counsel in securities litigation class action, and thus confidentiality order regarding bid auction process was improperly issued, where District Court failed to articulate "compelling countervailing interests" it found which would authorize closure through sealing of matters it sought to protect, and its order lacked factfinding or identification of compelling countervailing interests.

[25] Constitutional Law 92 © 2087

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(V) Judicial Proceedings 92XVIII(V)1 In General

92k2087 k. Access to proceedings;

closure. Most Cited Cases

(Formerly 92k90.1(3))

First Amendment right of access to civil trials exists independently of the common law right of access. U.S.C.A. Const.Amend. 1.

[26] Constitutional Law 92 © 2087

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(V) Judicial Proceedings 92XVIII(V)1 In General

92k2087 k. Access to proceedings;

closure. Most Cited Cases

(Formerly 92k90.1(3))

The general rationale behind First Amendment right of access to civil trials is that public access to civil trials plays an important role in the participation and the free discussion of governmental affairs. U.S.C.A. Const.Amend. 1.

[27] Constitutional Law 92 \$\infty\$ 2087

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(V) Judicial Proceedings

92XVIII(V)1 In General

92k2087 k. Access to proceedings;

closure. Most Cited Cases

(Formerly 92k90.1(3))

The First Amendment right of access to court proceedings and records requires a much higher showing than the common law right to access before a judicial proceeding can be sealed. U.S.C.A. Const.Amend. 1.

[28] Federal Courts 170B \$\infty\$=813

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent 170BVIII(K)4 Discretion of Lower Court 170Bk813 k. Allowance of remedy and

matters of procedure in general. Most Cited Cases

Courts of Appeals review a district court's imposition of sanctions under its inherent power for abuse of discretion.

[29] Federal Courts 170B \$\infty\$812

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent 170BVIII(K)4 Discretion of Lower Court 170Bk812 k. Abuse of discretion.

Most Cited Cases

A district court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

[30] Federal Civil Procedure 170A \$\infty\$2757

170A Federal Civil Procedure
170AXX Sanctions
170AXX(A) In General
170Ak2756 Authority to Impose
170Ak2757 k. Inherent authority. Most
Cited Cases

Before invoking its inherent authority to impose sanctions upon those who would abuse the judicial process, a court must consider a number of factors: (1) court must ensure that there is an adequate factual predicate for flexing its substantial muscle under its inherent powers; (2) court must ensure that the sanction is tailored to address the harm identified; and (3) court must consider the conduct at issue and explain why the conduct warrants sanction.

[31] Federal Civil Procedure 170A \$\infty\$2793

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2793 k. Violation of court orders.
Most Cited Cases

Attorney who was unsuccessful bidder for lead counsel position in consolidated securities litigation class actions did not violate terms of confidentiality order regarding bid auction process, and thus District Court had no factual predicate to impose sanctions against him, although he told reporter that he had filed objection to order appointing lead counsel, where attorney did not divulge substance of case deemed confidential; his objection was not under seal, was available to public, including media, and did not expressly divulge identity of any bidder.

*187 Adam N. Saravay (argued), McCarter & English, LLP, Newark, NJ, Attorneys for Appellant.

Judith E. Harris (argued), Lewis & Bockius, LLP, Philadelphia, PA, Amicus Curiae in support of the Order of the District Court.

Before: SCIRICA, FUENTES, and GARTH, Circuit Judges.

OPINION OF THE COURT

FUENTES, Circuit Judge.

This appeal raises important questions concerning the use of sealed bids in auctions conducted to select lead counsel in class action lawsuits. The genesis of the appeal lies in the District Court's selection of lead counsel in the Cendant "PRIDES" securities litigation based on the results of a competitive bidding process. The core of the dispute involves a confidentiality order in which the District Court decided to seal the bids until resolution of the case. The order was issued in connection with an in camera hearing where plaintiffs' attorneys, but not the general public, had access to the bids. After learning that one of the unsuccessful bidding attorneys, Howard Sirota, had spoken to a reporter from the New York Times about the bidding process, the District Court fined Sirota \$1,000. Sirota appeals the sanction. Because we conclude that the District Court failed to articulate the necessary findings for the issuance of the confidentiality order, and because we find that, in any case, Sirota did not violate the order, we will vacate the sanction. FN1

FN1. The Court takes this opportunity to express its appreciation to Judith E. Harris and the law firm of Morgan, Lewis & Bockius LLP, for arguing as amicus in support of the District Court's order in this case.

*188 I.

Some explanation of the underlying securities litigation provides a helpful background for the proceeding resulting in the sanction against Sirota. Because a full procedural and factual background of the Cendant litigation is set forth in numerous

published opinions, FN2 we will only discuss the facts most relevant to the resolution of the issues presented in this appeal. Briefly, on April 15, 1998, Cendant Corporation announced that it had uncovered substantial accounting irregularities and would have to restate reported annual and quarterly earnings for 1997 and possibly earlier; as a result, Cendant stock plummeted 46%. Some 64 lawsuits (mostly class actions) were filed against Cendant, its officers and directors; all but one were consolidated.

FN2. The District Court has authored several opinions. See, e.g., In re Cendant Corp. Litig., 182 F.R.D. 144 (D.N.J.1998); In re Cendant Corp. Prides Litig., 51 F.Supp.2d 537 (D.N.J.1999), vacated in part, 243 F.3d 722 (3d Cir.2001); In re Cendant Corp. Prides Litig., 189 F.R.D. 321 (D.N.J.1999), aff'd, 233 F.3d 188 (3d Cir.2000). The Cendant cases have also spawned a number of appeals to our Court. See, e.g., In re Cendant Corp. PRIDES Litig., 243 F.3d 722 (3d Cir.2001); In re Cendant Corp. PRIDES Litig., 235 F.3d 176 (3d Cir.2000); In re Cendant Corp. PRIDES Litig., 234 F.3d 166 (3d Cir.2000) ; In re Cendant Corp. Prides Litig., 233 F.3d 188 (3d Cir.2000).

On May 29, 1998, a preliminary case management/ scheduling order established a schedule for motions to address the appointment of lead counsel for the class. Among the fifteen motions filed was one submitted by Sirota, together with co-counsel John J. Barry and Charles C. Carella, to have their clients, the Joanne A. Aboff Family Trust ("Aboff") and Douglass Wilson, appointed as lead plaintiffs and to have themselves appointed lead counsel.

After considering the motions, the District Court outlined a process for selecting lead plaintiff and lead counsel. First, the District Court applied a statutory presumption that the plaintiff with the largest financial interest in the litigation should be appointed lead plaintiff. See In re Cendant Corp.

Litig., 182 F.R.D. 144, 146-47 (D.N.J.1998) (citing 15 U.S.C. § 77z-1(a)(3)(B)). Because of a possible conflict of interest, the District Court determined that a separate lead plaintiff would be appointed to pursue claims involving Income and Growth Prides ("PRIDES"), derivative securities based on Cendant common stock. See id. at 149-50. Neither Aboff nor Wilson was selected as a lead plaintiff.

FN3. The non-PRIDES claims included those of former shareholders of CUC International and HFS, Inc., companies which merged to form Cendant, as well as the claims of purchasers of Cendant stock. *See Cendant*, 182 F.R.D. at 146.

Second, in selecting lead counsel, the District Court adopted a competitive bidding system, reasoning that "the most effective way to establish reasonable attorney fees is through marketplace ... competition." *Id.* at 150. The District Court therefore ordered "an auction to determine the lowest qualified bidder to represent the class as counsel." *Id.* at 151. To be considered, plaintiffs' attorneys were required to submit bids under seal, stating, among other things, their professional qualifications and the fee arrangement that would be acceptable to them should they be selected as lead counsel. The record as of this date reveals that all bids remain under seal.

*189 On October 2, 1998, the District Court selected separate lead counsel for the non-PRIDES claims and for the PRIDES claims; Sirota and his co-counsel were not selected. In choosing lead counsel, the District Court stressed the need for confidentiality. Following an *in camera* hearing, attended only by applicants for the two lead counsel positions, *i.e.*, plaintiffs' attorneys, the court distributed an opinion containing a confidentiality order. The court ordered the identities of the bidders and the nature of their proposals sealed until the conclusion of the case, referring to the proposals only by number and explaining:

It is of utmost concern to the Court that this opin-

ion, the bidders' identities and the contents of their bids be sealed until resolution of this matter. This is done to maintain adversarial integrity, that of strategy and tactics, which is the prerogative of all parties, plaintiffs and defendants.

In re Cendant Corp. Litig., 191 F.R.D. 387, 387 (D.N.J.1998) (opinion selecting lead counsel). As a result of the *in camera* hearing and the confidentiality order, plaintiffs' attorneys, but not the general public, had access to each others' bids.

Thereafter, on November 30, 1998, the District Court separated the PRIDES claims from the rest of the Cendant case. In an order entered on March 18, 1999, the District Court preliminarily approved a proposed settlement of the PRIDES case presented by lead counsel and Cendant. The proposed settlement provided that, in return for dismissal and release of all claims, Cendant would confer upon each class member who opted in, one "Right" worth \$11.71 for each PRIDES held at the close of business on April 15, 1998, giving the settlement an aggregate theoretical value of \$341.5 million. The March 18, 1999 order also approved the "form and content" of notice to be distributed to class members regarding the settlement. That notice stated that lead counsel would apply for attorneys' fees, to be paid in Rights, in an amount not to exceed 10% of the \$341.5 million theoretical value of the settlement. To this effect, the notice contained the following assurance:

You also should know that the lead counsel appointment process included a court-mandated bidding process. This was intended to assure that the largest possible portion of any recovery remained with participating class members, or conversely that qualified lead counsel took the least possible sums from the benefits to be obtained by participating class members. In Lead Counsel's view, under the fee mechanism proposed by Lead Counsel and described herein, there is a substantial likelihood that a substantial part, if not all, of the fees sought will be obtained from Unclaimed Rights and Opt Out Rights. As a consequence, *in*

Lead Counsel's view, those Class Members who become Authorized Claimants will not have to pay any of Lead Counsel's fees, or if they do, there is a substantial likelihood that it will be less than the amount otherwise payable under the bids approved by the Court in the process of appointing lead counsel.

In re Cendant Corp. Prides Litig., No. 98-2819, slip op. at ---- (D.N.J. Mar. 18, 1999) (emphasis added) (order regarding proposed class action settlement, settlement hearing and notice of proposed settlement).

Besides preliminary approval and notice, the order of March 18, 1999 also provided that any class member wishing to object to the settlement or to the lead counsel's fee application should file written objections with the District Court. On May 4, 1999, Sirota, along with co-counsel, filed objections*190 on behalf of Aboff to the proposed settlement and to lead counsel's application for fees. In particular, the brief submitted by Sirota argued that "the \$34 million fee Lead Counsel seeks far exceeds the fee Lead Counsel agreed to accept [in the bidding auction]."

On May 14, 1999, the New York Times published an article stating, "Mr. Sirota calculates that the value of [lead counsel's proposed fee] would be \$34 million, and argues that it would thus be about 10 percent of the total settlement fund a percentage he contends greatly exceeds the confidential bid that [lead counsel] submitted to the court last year." Diana B. Henriques, *Lawyers Handling Litigation Against Cendant Propose an Innovative Way to Pay Their Fees*, N.Y. Times, May 14, 1999, at C7. Seeing this article, the District Court issued an order "to show cause why [Sirota] should not be held in contempt and sanctioned for violations of this Court's confidentiality order of October 2, 1998."

FN4. In its entirety, the order provided:

The Court brings this matter on its own

initiative for Howard B. Sirota to be ordered to show cause why he should not be held in contempt and sanctioned for violations of this Court's confidentiality order of October 2, 1998 as reported in the New York Times on May 14, 1999 ("Mr. Sirota calculates that the value of that compensation [Kirby's proposed fee] would be \$34 million, and argues that it would thus be about 10 percent of the total settlement fund-a percentage he contends greatly exceeds the confidential bid that the Kirby firm submitted to the court last year.").

It is on this 17th day of May, 1999:

ORDERED that Mr. Sirota appear before this Court on the 19th day of May, 1999 at 10:00 a.m. to show cause why he has not violated this Court's confidentiality order of October 2, 1998 and why he should not be held in contempt and sanctioned.

On May 19, 1999, the District Court held a hearing on the order to show cause, focusing on whether Sirota's apparent statement to the New York Times concerning lead counsel's bid violated the October 2, 1998 confidentiality order. Defending himself, Sirota explained that: (1) he had no intention to violate the confidentiality order; (2) he had simply told a reporter from the New York Times that he had filed an objection with the District Court; (3) he did not make any substantive comments to the reporter; (4) the newspaper article merely referred to arguments made in his written objection of May 4, 1999; and (5) Sirota believed that the relative comparisons made in the written objection had been authorized by the District Court's March 18, 1999 order. As to the last point, Sirota noted that the March 18, 1999 order which preliminarily approved the settlement of the PRIDES case, also approved a form of notice stating lead counsel's belief that the attorneys' fees would be less than provided for by the bidding process. Thus, Sirota argued that it was reasonable for him to believe that the confidentiality order did not prohibit him from responding to lead counsel's contention that the proposed fee was less than the bid by arguing that it was actually more than the bid:

[Because of the notice], the defendants and everyone else knew the relative magnitude of the fee sought and that according to [lead counsel] it was not more than the bid. The rationale of keeping the defendants from knowing the amount of the compensation of their adversary, I thought, was over as reflected in the Court authorized notice and reflected in [lead counsel's] understanding that one could make claims. [Lead counsel] made the claim in the notice.... The Court invited objections in the notice and we came and said truthfully he is asking for more than his bid.

*191 Thereafter, the District Court stated that it had "no problem" with Sirota making this argument in court, but that speaking to the press was different.

At the conclusion of the hearing, the District Court determined that finding Sirota in contempt was unwarranted. Nevertheless, relying on Local Civil Rule 101.1 and on its inherent power to discipline attorneys, the District Court imposed sanctions on Sirota for violating the confidentiality order. The District Court explained:

Why am I doing that? Because having you yourself admitted to twenty years before a bar if not the New Jersey bar, I hold you to that of a reasonable attorney who, when confronted with a specific order of confidentiality, a specific order of confidentiality before he would broach the subject to a third party such as the press, whether generally or specifically, he should have, in good conscience or in good professionalism at least made contact with the Court to insure that whatever he said did not violate the order. To come to court now and say that because there is a, the reference is made by lead counsel in the notice to claimants that one feels free to do what

you did is not good enough as far as I'm concerned ...

....

You have a professional obligation to, as counsel for the objector, to point out to the Court your objection. I don't understand it. Maybe I never practiced in New York, but, I didn't think you had a professional obligation to point out your objection with regard to this matter to a newspaper.

The next day, May 20, 1999, the District Court entered an order, fining Sirota \$1,000.

On June 18, 1999, Sirota filed a notice of appeal from the order imposing sanctions. We have jurisdiction over this appeal pursuant to the final order doctrine of 28 U.S.C. § 1291. This includes final decisions in attorney disciplinary proceedings. See In re Ashton, 768 F.2d 74 (3d Cir.1985); In re Abrams, 521 F.2d 1094 (3d Cir.1975).

FN5. We note that on June 25, 1999, the District Court approved a settlement in the Cendant PRIDES case and certified the judgment embodying that settlement and awarding attorneys' fees to lead counsel as final under Federal Rule of Civil Procedure 54(b). *In re Cendant Corp. Prides Litig.*, 51 F.Supp.2d 537 (D.N.J.1999), *rev'd*, 243 F.3d 722 (3d Cir.2001). If Sirota's appeal from the sanctions order were construed as premature, it would have ripened upon entry of the final judgment in the Cendant PRIDES case. *See Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir.1999).

II.

[1] The nominal issue on appeal is whether the District Court erred in sanctioning Sirota for violating the October 2, 1998 confidentiality order by speaking to the New York Times. That issue, however, is predicated upon the more basic question of whether the confidentiality order underlying the sanction was properly issued. Because of this

dependent relationship, we feel compelled, before even considering the District Court's sanction of Sirota, to first address the propriety of the confidentiality order. What constitutes the proper legal standard for granting a confidentiality order sealing bids is an issue of law, over which we exercise plenary review. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 783-84 (3d Cir.1994).

[2] In addition to this dependent relationship, we also have an inherent supervisory power, arising out of Fed.R.Civ.P. 26, to fashion and clarify rules for district courts governing the district courts' power *192 to enter confidentiality orders at the discovery stage or any other stage of litigation. See Pansy, 23 F.3d at 786 & n. 16, 789 & n. 22. Accordingly, there exists a sufficient basis for us to evaluate the District Court's efforts to preserve the secrecy of bids. In doing so, we conclude that, in deciding to seal the bids, the District Court failed to recognize that the bids were judicial records, subject to the common law presumption of public access. As a result, the District Court failed to articulate the necessary findings to override the presumption of access when issuing the confidentiality order.

A.

[3][4] It is well-settled that there exists, in both criminal and civil cases, a common law public right of access to judicial proceedings and records. *Little-john v. BIC Corporation*, 851 F.2d 673, 677-78 (3d Cir.1988). The public's right of access extends beyond simply the ability to attend open court proceedings. Rather, it envisions "a pervasive common law right 'to inspect and copy public records and documents, including judicial records and documents, including judicial records and documents.'" *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 161 (3d Cir.1993). As we explained in *Littlejohn*, the right of access strengthens confidence in the courts:

The public's exercise of its common law access right in civil cases promotes public confidence in the judicial system by enhancing testimonial trustworthiness and the quality of justice dis-

pensed by the court. As with other branches of government, the bright light cast upon the judicial process by public observation diminishes possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness.

851 F.2d at 678 (citations omitted). In addition, "[a]ccess to civil proceedings and records promotes 'public respect for the judicial process' and helps assure that judges perform their duties in an honest and informed manner." *Leucadia*, 998 F.2d at 161 (citations and internal quotations omitted).

[5][6] The public right of access clearly applies to the in camera hearing conducted by the District Court, as that hearing was a judicial proceeding. We also believe that the right applies to the bids. Whether or not a document or record is subject to the right of access turns on whether that item is considered to be a "judicial record." Pansy, 23 F.3d at 781. The status of a document as a "judicial record," in turn, depends on whether a document has been filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings. Id. at 780-83. While filing clearly establishes such status, a document may still be construed as a judicial record, absent filing, if a court interprets or enforces the terms of that document, or requires that it be submitted to the court under seal. See Enprotech Corp. v. Renda, 983 F.2d 17, 20 (3d Cir.1993); but cf. Pansy, 23 F.3d at 780-83. FN6 Especially relevant here is the case of Leucadia, in which we held that "there is a presumptive right of public access to pretrial motions of a nondiscovery*193 nature, whether preliminary or dispositive, and the material filed in connection therewith." 998 F.2d at 164.

FN6. Pansy held that a settlement agreement not filed with the district court, but submitted to and reviewed by that court, was not a judicial record. However, Pansy's holding is inapplicable here be-

cause, among other reasons, unlike the settlement agreement in that case, the records at issue here were submitted at the District Court's request and were generated in connection with the litigation.

[7] In the present case, the District Court's auction procedure transformed the bids into judicial records. The District Court relied on the 1995 Private Securities Litigation Reform Act ("PSLRA") as authority for the selection by lead plaintiffs of lead counsel. The PSLRA provides: "The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class." 15 U.S.C. \S 77z-1(a)(3)(B)(v) (emphasis added). Viewing its approval under the PSLRA as a discretionary judgment, the District Court ordered plaintiffs' attorneys to submit bids, In re Cendant Corp. Litig., 182 F.R.D. at 150-51, and the attorneys did so in direct response to the court's command. While not explicitly denominated as such, the bids were essentially submitted in the form of motions to be appointed lead counsel. See id. at 151 (ordering bidders to describe why they are professionally qualified to be lead counsel). Following the in camera hearing, the District Court ruled, and issued an Order appointing counsel. In re Cendant Corp. Litig., 191 F.R.D. at 387. That Order, a public document itself, summarized the content of the bids in an encoded chart. Id. In these circumstances, we believe that, at the time of the District Court's confidentiality order, the bids were judicial documents subject to the common law right to access.

В.

[8][9] The practical effect of the right to access doctrine is to create an independent right for the public to view proceedings and to inspect judicial records. See Pansy, 23 F.3d at 781. The right of public access is particularly compelling here, because many members of the "public" are also plaintiffs in the class action. Accordingly, all the reasons we discussed in Littlejohn for the right of access to public records apply with even greater

force here. See p. 192, supra. Protecting the access right in class actions "promotes [class members'] confidence" in the administration of the case. *Little-john*, 851 F.2d at 678. Additionally, the right of access diminishes the possibility that "injustice, incompetence, perjury, [or] fraud" will be perpetrated against those class members who have some stake in the case but are not at the forefront of the litigation. *Id*. Finally, openness of class actions provides class members with "a more complete understanding of the [class action process] and a better perception of its fairness." *Id*.

[10] Indeed, the information sealed in this case and kept secret from most of the parties was of the utmost importance in the administration of the case; it was directly relevant to the selection of lead counsel. This point is crucial. In class actions, the lead attorneys have an unusual amount of control over information concerning the litigation. By contrast, class members often have little input into the conduct of the class action and accompanying settlement negotiations, because of the large scale of litigation and the disconnect between defendants' possibly enormous liability and the relatively small recovery available to the individual plaintiffs. The only stage at which class members can exercise effective control is in the selection of class counsel. Throwing a veil of secrecy over the selection process deprives class members of that opportunity.

Thus, there should have been, in the present case, a strong presumption that the bids and the *in camera* proceeding would be part of an open process, accessible to the public. *See Littlejohn*, 851 F.2d at 678. That presumption disallows the *194 routine and perfunctory closing of judicial records. *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3d Cir.1994). Our discussion, however, does not end here.

[11][12] Although the common law right to public access is a recognized and venerated principle, courts have also recognized the accompanying principle that "the right is not absolute." *Little-john*, 851 F.2d at 678; *Leucadia*, 998 F.2d at 165

(same); *Publicker Indus., Inc. v. Cohen,* 733 F.2d 1059, 1070 (3d Cir.1984) (same). The presumption of public access may be rebutted. *See Republic of Philippines v. Westinghouse Elec. Corp.,* 949 F.2d 653, 662 (3d Cir.1991). "Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Little-john,* 851 F.2d at 678 (quoting *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 598, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978)). Thus, the question becomes, under what circumstances may a district court seal judicial proceedings or documents, such as bids, by means of a confidentiality order. For this question, there are settled standards.

[13][14][15] In order to override the common law right of access, the party seeking the closure of a hearing or the sealing of part of the judicial record "bears the burden of showing that the material is the kind of information that courts will protect" and that "disclosure will work a clearly defined and serious injury to the party seeking closure." Miller, 16 F.3d at 551 (citing Publicker, 733 F.2d at 1071). In delineating the injury to be prevented, specificity is essential. See Publicker, 733 F.2d at 1071. Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient. As is often the case when there are conflicting interests, a balancing process is contemplated. "[T]he strong common law presumption of access must be balanced against the factors militating against access. The burden is on the party who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption." Leucadia, 998 F.2d at 165 (quoting Bank of Am. Nat'l Trust and Sav. Ass'n v. Hotel Rittenhouse Assoc., 800 F.2d 339, 344 (3d Cir.1986)).

[16][17] Additionally, because of the peculiar posture of class actions whereby some members of the public are also parties to the class action, and because of the importance of selection of lead counsel to class action plaintiffs, the test for overriding the right of access should be applied in this

case with particular strictness. We are guided in the formation of a stricter standard by *Miller*, where the sealing order warranted exceptional scrutiny because the district court had sealed the entire record. In that case, we held:

In a case such as this, involving ordinary civil litigation, the district court, before taking such an unusual step, should have articulated the *compelling countervailing interests* to be protected, made specific findings on the record concerning the effects of disclosure, and provided an opportunity for interested third parties to be heard.

Miller, 16 F.3d at 551 (citations omitted) (emphasis added). Thus, we hold that a "compelling countervailing interests" standard is most appropriate here, with the additional requirement of specific findings. This may or may not require a hearing.

Therefore, our emphasis here is on the District Court's denial of public access to the bids and proceedings in connection with the sealed bid auction employed to select lead counsel in this case, and we do not focus here nor decide on the propriety of bid auctions generally.

*195 In re Oracle Sec. Litig., 136 F.R.D. 639 (N.D.Cal.1991), the district court case relied upon by the District Court in the present case, admittedly is one of the earliest cases in which competitive bids for lead counsel and the propriety of sealing such bids was considered. Oracle opted for competitive selection of class counsel for a number of reasons which we decline to explore inasmuch as the issue of competitive selection is not presented on this appeal. Suffice it to say, the reasons listed in Oracle for use of competitive bidding provoke serious reservations and concerns here, but we leave the decision as to whether competitive bidding is appropriate, justifiable, or desirable to the future case where that issue is directly raised.

FN7. We do note, for background purposes, that lead counsel auctions have not been widely used by federal courts. *See*

Developments, *The Paths of Civil Litigation*, 113 Harv. L.Rev. 1827, 1842 (2000) [*Civil Litigation*] (noting that auctions have been used in only four federal district courts, and only within the securities and antitrust context). Recently, Chief Judge Becker of this Court formed a task force to examine in detail the competitive bidding process and the method of selecting lead counsel in federal class action litigation. *See* Editorials, *Class-Counsel Auctions*, N.J.L.J., Feb. 12, 2000, at 22.

FN8. Indeed, one district court has affirmatively rejected bid auctions, holding that such auctions violate the PSLRA. *See In re Razorfish, Inc. Sec. Litig.*, 143 F.Supp.2d 304, 311 (S.D.N.Y.2001).

[18] Regardless of whether bidding for lead counsel would be deemed appropriate, however, we can neither subscribe to nor affirm the District Court's ruling that the bidding auction the court conducted should have been closed, i.e., sealed and kept from the very parties to whom our precedents and logic advocate disclosure. Indeed, this very principle was recognized in *Oracle*, where the court refused to seal or hold secret the bids for class counsel.

The Oracle court did this in part by rejecting claims that an open bidding process would allow the defendants to obtain information about lead counsel's evaluation of the case and might permit them to economically "squeeze" lead counsel by protracting proceedings. The Oracle court opined, as we do, that disclosure of class counsel's bids and compensation arrangements benefits the class because, "[u]nlike the usual attorney-client situation, ... class members do not participate in the negotiations by which a part of their claim is bargained away." 136 F.R.D. at 645. Moreover, class members are not in a position to monitor the faithfulness of their self-appointed champion. See, e.g., In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir.1995)

(where the original settlement called for lead counsel to receive attorneys' fees in the amount of \$9.5 million, and class plaintiffs received no more than a \$1,000 certificate towards a GM truck).

Thus, we generally believe that opening the bidding process (if such a process is to be authorized), while not a panacea for the agency problems in class actions, should facilitate the monitoring of lead counsel by class members and others. The disclosure of bids also comports with the spirit of the Model Rules of Professional Conduct. *See* Model Rules of Prof'l Conduct R. 1.5(b) (1983) (requiring communication to the client of the "basis or rate of the fee ... before or within a reasonable time after commencing the representation").

We find implicit recognition of these principles in the 1985 Third Circuit Task Force report on court-awarded attorneys' fees. In analogous circumstances, the Task Force expressed concern that, when lead counsel seeks fees after a settlement *196 has been reached, "the plaintiffs' attorney's role changes from one of a fiduciary for the clients to that of a claimant against the fund created for the clients' benefit." Court Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 F.R.D. 237, 255 (1985) [hereinafter Task Force Report]. The Task Force Report accordingly recommended that district courts force the negotiation of class counsel's fee, asserting the "critical importance [in] assuring that the compensation plan is negotiated in an open and appropriately arm's length manner." Id. at 256 (emphasis added).

[19] The strong presumption of public access forces district courts to be cognizant of when the reasons supporting sealing in a specific case (if any are found) have either passed or weakened, and to be prepared at that time to unseal bids and allow public access. Even if a sealing order was proper at the time when it was initially imposed, the sealing order must be lifted at the earliest possible moment when the reasons for sealing no longer obtain. As we observed in *Leucadia*, "continued sealing must be based on 'current evidence to show how public

dissemination of the pertinent materials *now* would cause the competitive harm [they] claim[].' "998 F.2d 157, 167 (3d Cir.1993) (emphasis added). By establishing a strong presumption in favor of an open process, we intend to instill a measure of consistency into an important area where district courts have varied widely in their practice.

FN9. In cases employing competitive bidding to select lead counsel, some district courts have used what appear to be an open, unsealed bidding process. See, e.g., In re California Micro Devices Sec. Litig., 168 F.R.D. 257, 259-60 (N.D.Cal.1996). Other courts have sealed the bids but later unsealed them when the lead counsel was selected. See, e.g., In re Amino Acid Lysine, 918 F.Supp. 1190, 1192, 1201 (N.D.III.1996); In re Bank One S'holders Class Actions, 96 F.Supp.2d 780, 782, 785 (N.D.III.2000); In re Wells Fargo Sec. Litig., 157 F.R.D. 467, 468 (N.D.Cal.1995). Besides the District Court here, we have found only one other court that has utilized a completely sealed bidding process. See In re Auction Houses Antitrust Litig., 197 F.R.D. 71, 74, 84 (S.D.N.Y.2000).

III.

The heightened standard which we have held must be applied to sealing class action bids is also supported by the language and legislative history of the PSLRA. The PSLRA sets forth a detailed procedure for class members to apply to become lead plaintiffs. Additionally, the PSLRA provides that "[t]he most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class." 15 U.S.C. § 77z-1(a)(3)(B)(iv).

FN10. It should be noted that the District Court applied the provisions of the PSLRA several times in the course of the Cendant litigation, though never in the context of selection of lead counsel. See, e.g., In re Cendant Corp. Litig., 139 F.Supp.2d 585

(D.N.J.2001) (PSLRA barred contribution claims); *In re Cendant Corp. Litig.*, 109 F.Supp.2d 285 (D.N.J.2000) (attorneys' fees awarded pursuant to the PSLRA); *In re Cendant Corp. Litig.*, 109 F.Supp.2d 235 (D.N.J.2000) (applied PSLRA in connection with notice of proposed settlement); *In re Cendant Corp. Litig.*, 76 F.Supp.2d 539 (D.N.J.1999) (PSLRA requires showing of scienter in securities fraud action).

FN11. The PSLRA states that the court "shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be the most capable of adequately representing the interests of class members (hereinafter in this paragraph referred to as the 'most adequate plaintiff') ..." 15 U.S.C. § 77z-1(a)(3)(B)(i) (emphasis added).

The legislative history of the PSLRA explains that the Act's purpose is:

(1) to encourage the voluntary disclosure of information by corporate issuers; *197 (2) to empower investors so that they-not their lawyers-exercise primary control over private securities litigation; and (3) to encourage plaintiffs' lawyers to pursue valid claims and defendants to fight abusive claims.

S.Rep. No. 104-98, at 4 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 683 (emphasis added).

The legislative history also points out that "[i]nvestors in the class usually have great difficulty exercising any meaningful direction over the case brought on their behalf. The lawyers can decide when to sue and when to settle, based largely on their own financial interests, not the interests of their purported clients." S. Rep., U.S.C.C.A.N. at 685. Additionally:

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found 'evidence * * * that plaintiffs' counsel in many instances litigate with a view toward ensuring payment for their services without sufficient regard to whether their clients are receiving adequate compensation in light of evidence of wrongdoing.' The comment by one plaintiffs' lawyer-'I have the greatest practice of law in the world. I have no clients.'-aptly summarizes this flaw in the current system.

S. Rep., U.S.C.C.A.N. at 685.

[20] To regulate this practice of lawyers, instead of lead plaintiffs, driving securities class actions, Congress enacted the PSLRA, through which, "[s]ubject to court approval, the most adequate plaintiff retains class counsel." H. Conf. Rep. No. 104-369, at 35 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 734. The Senate Committee explained: "This provision is intended to permit the plaintiff to choose counsel rather than have counsel choose the plaintiff." S.Rep. No. 104-98, at 11 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 690 (emphasis added).

[21] Congress' clear intent in enacting the PSLRA was to transfer control of securities class actions from the attorneys to the class members (through a properly selected lead plaintiff). The sealing of the bids in the lead counsel auction in this case contravenes this purpose. Instead of allowing the class plaintiffs in this action to choose lead counsel, the District Court selected class counsel through a sealed bidding process which has yet to be unsealed. It also prevented many class plaintiffs and defendants from accessing the bids for lead counsel. Sealing the bids in this case enabled counsel to "'litigate with a view toward ensuring payment for their services without sufficient regard to whether their clients are receiving adequate compensation in light of evidence of wrongdoing." S.Rep., U.S.C.C.A.N. at 685. FN12

FN12. We do recognize that, in this case, the District Court gave lead plaintiffs' counsel the option of matching the most

acceptable bid and becoming lead counsel.

IV.

[22][23] Of course, notwithstanding the limitations on sealing created by the common law public right to access, "[t]he balancing of the factors for and against access is a decision committed to the discretion of the district court, although it is not generally accorded the narrow review reserved for discretionary decisions based on first-hand observations." Bank of Am. Nat'l Trust and Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 344 (3d Cir.1986). The discretion that exists, however, must be exercised properly because the issuance of a confidentiality order overriding the common law right of public access contemplates an analytical process.

[24][25][26][27] In this respect, we hold that the District Court abused its discretion in sealing the bids. Apart from one general *198 and ambiguous reference to "adversarial integrity" "strategy and tactics," the District Court did not provide any clear reason for why it sealed the bids. The court did not recognize the presumption of access, nor did it engage in balancing process to determine whether the bids were the type of information normally protected or whether there was a clearly defined injury to be prevented. See Publicker, 733 F.2d at 1073 (noting similar procedural deficiencies in the context of the First Amendment right to access); accord Criden, 648 F.2d at 819 (stating that district courts must "provide a firm base for an appellate judgment that discretion was soundly exercised"). Here, before sealing the entire bid record, the District Court should have articulated the "compelling countervailing interests" it found which would authorize the closure through sealing of the matters it sought to protect. Miller, 16 F.3d at 551. No such factfinding or identification of compelling countervailing interests can be found in the District Court's order. We therefore conclude that the District Court's confidentiality order of October 2, 1998, was improperly issued, and therefore, invalid. $^{\rm FN13}$

FN13. In addition to the common law right of access, we note that the Third Circuit has held that the "First Amendment [also] embraces a right of access to [civil] trials." Publicker, 733 F.2d at 1070 (citation and internal quotations omitted). This right exists independently of the common law right of access. See Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 659 (3d Cir.1991). The general rationale behind this right is that "[p]ublic access to civil trials ... plays an important role in the participation and the free discussion of governmental affairs." Publicker, 733 F.2d at 1070; see also Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596, 604-05, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1980) ("[T]o the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one.").

The First Amendment right of access requires a much higher showing than the common law right to access before a judicial proceeding can be sealed. In Publicker, for example, we stated that "to limit the public's access to civil trials [where First Amendment right to access applies,] there must be a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest." 733 F.2d at 1070. We also described certain procedural and substantive requirements that are required when the First Amendment applies. 733 F.2d at 1071-73.

However, the parameters of the First Amendment right of access to civil proceedings are undefined. There remain significant constitutional questions about (Cite as: 260 F.3d 183)

what documents are subject to its reach. See Littlejohn, 851 F.2d at 680 n. 14. Because we conclude that the District Court's confidentiality order did not satisfy the requirements for abridging even the common law right of access, we will not address these issues. See Hagans v. Lavine, 415 U.S. 528, 547, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974) (noting "the ordinary rule that a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available").

V.

In addition to concluding that the October 2, 1998 confidentiality order was improperly issued, we conclude that the District Court erred in finding that Sirota violated the terms of the order. This point is important because, among other reasons, the fine was widely reported in the newspapers and legal journals, and because attorney disciplinary authorities in New York have initiated an inquiry, which is still pending, to determine whether Sirota should be sanctioned in New York based on the same facts that led the District Court to impose the fine.

[28][29] Sirota's principal argument is that the District Court abused its discretion in sanctioning him \$1,000 for speaking to a newspaper reporter. "
'We review a *199 district court's imposition of sanctions under its inherent power for abuse of discretion.' "Republic of Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 75 (3d Cir.1994) (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 55, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)). A district court "abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Garr v. U.S. Healthcare, Inc., 22 F.3d 1274, 1279 (3d Cir.1994) (citation and internal quotations omitted).

At the sanction hearing, the District Court informed Sirota that it was proceeding pursuant to L.Civ.R. 101.1, which gives the court broad author-

ity to discipline attorneys. Clearly, the court had authority to proceed under this Rule and under its inherent disciplinary jurisdiction.

The Supreme Court has long established that "[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227, 5 L.Ed. 242 (1821); accord Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510, 22 L.Ed. 205 (1873). This Court, as well, has recognized the authority of district courts to wield sanctioning power, in the form of the court's "inherent authority," where necessary to preserve the integrity of the judicial process. Philippines, 43 F.3d at 73; accord Eash v. Riggins Trucking, Inc., 757 F.2d 557, 560-65 (3d Cir.1985) (discussing thoroughly the inherent powers of courts); In re Corn Derivatives Antitrust Litig., 748 F.2d 157, 160 (3d Cir.1984); In re Abrams, 521 F.2d 1094, 1099 (3d Cir.1975); 11A Charles A. Wright et al., Federal Practice and Procedure § 2960 (2d ed.1995) (analyzing the inherent power of federal courts to punish in contempt).

We have emphatically stated that federal courts retain the inherent power "to sanction errant attorneys financially both for contempt and for conduct not rising to the level of contempt." *Eash*, 757 F.2d at 566 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980)). The *Eash* court elaborated:

[The] Supreme Court ... [has] stat[ed] that the "inherent power" to sanction an attorney was "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." If a court's inherent powers include the ability to do whatever is reasonably necessary to deter abuse of the judicial process, ... courts must be able to impose reasonable sanctions for conduct by lawyers that falls short of contempt of court.

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Id. at 567 (citations omitted).

[30] Requiring courts to await the conclusion of extensive investigation and prosecution procedures following every courtroom infraction would greatly compromise the courts' ability to direct and control the proceedings. Acknowledging the weighty interest judges have in maintaining order in court affairs, we have recognized that "district courts have broad authority to preserve and protect their essential functions." *Philippines*, 43 F.3d at 73. We have also previously observed that formal rules and statutes do not exhaust a district court's power to control errant behavior:

To the contrary, the Supreme Court recently reaffirmed that a district court has *inherent* authority to impose sanctions upon those who would abuse the judicial process.... The Supreme Court explained that "[i]t has long been understood that certain implied powers must necessarily result to our Courts of justice*200 from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others."

Id. at 73 (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (internal quotations and citations omitted)). Before invoking its inherent authority, a court must consider a number of factors:

Of course, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." "A primary aspect of [a district court's] discretion is the ability to fashion an *appropriate* sanction for conduct which abuses the judicial process." Thus, a district court must ensure that there is an adequate factual predicate for flexing its substantial muscle under its inherent powers, and must also ensure that the sanction is tailored to address the harm identified.... [T]he court must consider the conduct at issue and explain why the conduct warrants sanction.

Id. at 74 (quoting *Chambers*, 501 U.S. at 44, 111 S.Ct. 2123).

[31] Here, we are constrained to conclude that no adequate factual predicate existed to justify the exercise of the District Court's inherent authority. The proceeding against Sirota commenced when the court initially charged him with violating its confidentiality order. Sirota conceded that he had spoken to the New York Times without initially approaching the District Court, but insisted that he had divulged no information of substance:

I spoke to the New York Times and said we filed a brief and if you want to see it, you can see it. And, I have confirmed with the author of the article that she was quoting from the brief and that I made no substantive oral statement to the New York Times. They are quoting from our brief.

The District Court did not dispute the truth of Sirota's assertion. Instead, the court seems only to have stated that Sirota's behavior breached standards of "good conscience or ... good professionalism":

I hold you to that of a reasonable attorney who, when confronted with a specific order of confidentiality, ... before he would broach the subject to a third party such as the press, whether generally or specifically, he should have, in good conscience or in good professionalism at least made contact with the Court to insure that whatever he said did not violate the order.

Certainly, a violation of the confidentiality order would constitute "conduct which abuses the judicial process" and could justify a sanction. However, the record does not support a finding that Sirota violated any order.

Amicus counsel, in support of the District Court's order, argues that Sirota did, in fact, violate the confidentiality order because Sirota's brief may have, by implication, identified two bidders for the lead counsel position, himself and Kirby. The problem with this contention is that Sirota's brief was not under seal, was available to the general public, and did not expressly divulge the identity of any bidder. In essence, the brief is nothing more than a

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response to the court's order of March 18, 1999, which required that any class member wishing to contest an aspect of the settlement "file said objections, papers and briefs with the Clerk of the United States District Court for the District of New Jersey."

We further observe that, when Sirota asserted at the hearing that all the information recited by the reporter simply derived from material "[w]e filed ... in our briefs before your Honor," the court responded, "I don't have any problem with *201 that in court. I have no problem with your objecting in court, none whatsoever, none whatsoever." Thus, under the District Court's reading, Sirota was free to present in open court the same material he presented in his brief. The public, including the media, had a right of access to all such material. See Leucadia, 998 F.2d at 161 ("the public has the right to inspect and copy judicial records"). While it would be improper for an attorney to divulge the substance of a case that the court has deemed confidential, the public's right of access demands that the attorney must, at the very least, be able to refer a reporter to a public document.

Finding that his written submissions did not offend the confidentiality order, the Court, instead, objected solely to Sirota's contact with the media. However, because the District Court could not identify any improper extrajudicial statement, it could not sanction Sirota for contacting the media in violation of the confidentiality order. *See* L. Civ. R. 105.1 ("Notwithstanding [the Local Rules on extrajudicial statements], a lawyer involved in the litigation of a matter may state without elaboration ... the information contained in a public record."). Under these circumstances, we find no violation of the court's confidentiality order and no evidence of any misconduct.

VI.

For the foregoing reasons, we will vacate the District Court's sanction, and we direct that the District Court enter an order unsealing all sealed bids and documents in the record if it has not already done so.

C.A.3 (N.J.),2001. In re Cendant Corp. 260 F.3d 183

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(Cite as: 809 F.2d 1210)



United States Court of Appeals, Sixth Circuit.

Kay APPONI, et al., Class Action, Plaintiffs-Appellees, Cross-Appellants,

v.

SUNSHINE BISCUITS, INC., Defendant-Appellant, Cross-Appellee.

Nos. 85-3782, 85-3783. Argued July 22, 1986. Decided Jan. 15, 1987.

Rehearing and Rehearing En Banc Denied Feb. 18, 1987.

Rehearing Denied Feb. 20, 1987.

Former employees brought action against employer seeking benefits under employer's pension plan, after bakery where employees worked was closed. After cause was remanded for consideration of employer's claims of estoppel and waiver, 652 F.2d 643, the United States District Court for the Southern District of Ohio, Carl B. Rubin, Chief Judge, determined that employer made certain representations and, after cause was again remanded for determination of lump-sum damage awards, ordered employer to pay award into court, and both parties appealed. The Court of Appeals, Milburn, Circuit Judge, held that: (1) employees' claims would be treated as claims under the Labor Management Relations Act; (2) claims were not barred by applicable Ohio statutes of limitations; (3) employees' claims would not be dismissed for failure to exhaust contractual remedies; and (4) presentation of single issue of employers' representation to jury improperly deprived employer of jury trial on all elements of waiver and estoppel.

Reversed in part and remanded.

West Headnotes

[1] Federal Courts 170B \$\infty\$=21

170B Federal Courts

170BVI State Laws as Rules of Decision 170BVI(C) Application to Particular Matters 170Bk421 k. Labor and Employment;

Workers' Compensation. Most Cited Cases

Affirmative defense waiver rule would not be applied to preclude employer's contention that employees' action to recover early retirement benefits was preempted by Labor Management Relations Act in that it arose out of employee's purported obligations under collectively bargained pension plan or directly out of collective bargaining process itself, given compelling policy in favor of uniform application of federal law in actions to enforce labor contracts. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

[2] Federal Courts 170B \$\infty\$=421

170B Federal Courts

170BVI State Laws as Rules of Decision 170BVI(C) Application to Particular Matters 170Bk421 k. Labor and Employment;

Workers' Compensation. Most Cited Cases

Labor Management Relations Act jurisdictional provision pertaining to violations of collectively bargained contracts authorizes federal courts to fashion substantive law to be applied in suits thereunder. Labor Management Relations Act, 1947, §§ 301, 301(a), 29 U.S.C.A. §§ 185, 185(a).

[3] Federal Courts 170B 🗪 421

170B Federal Courts

170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk421 k. Labor and Employment;

Workers' Compensation. Most Cited Cases

States 360 € 18.46

360 States

360I Political Status and Relations 360I(B) Federal Supremacy; Preemption 360k18.45 Labor and Employment

(Cite as: 809 F.2d 1210)

360k18.46 k. In General. Most Cited

Cases

(Formerly 360k18.45)

Federal court, in fashioning federal substantive law applicable to action under Labor Management Relations Act for violation of collectively bargained contract, may resort to state law if it is compatible with federal labor policies; however, inconsistent state law must give way to principles of federal labor law. Labor Management Relations Act, 1947, §§ 301, 301(a), 29 U.S.C.A. §§ 185, 185(a).

[4] States 360 \$\infty\$ 18.46

360 States

360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.45 Labor and Employment
360k18.46 k. In General. Most Cited

Cases

(Formerly 360k18.45)

For preemption purposes, former employees' claims for recovery of early retirement benefits following closing of bakery arose from employer's purported obligations under collectively bargained pension plan and, therefore, claims had to be treated as claims for violation of collectively bargained contract under the Labor Management Relations Act. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

[5] Federal Courts 170B \$\infty\$=424

170B Federal Courts

170BVI State Laws as Rules of Decision 170BVI(C) Application to Particular Matters 170Bk422 Limitation Laws

170Bk424 k. Federally Created Rights.

Most Cited Cases

Federal courts may still resort to most analogous state statute of limitations in action for violation of collectively bargained contract under Labor Management Relations Act, rather than six-month statute of limitations under National Labor Relations Act, where action does not implicate breach of union's duty of fair representation. National Labor Relations Act, § 10(b), as amended, 29 U.S.C.A. § 160(b); Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

[6] Labor and Employment 231H \$\infty\$679

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(K) Actions
231HVII(K)5 Actions to Recover Benefits
231Hk679 k. Time to Sue and Limita-

tions. Most Cited Cases

(Formerly 296k139)

Either six-year statute of limitations for actions alleging breach of oral contract or 15-year statute of limitations for actions alleging breach of written contract was Ohio statute of limitations most analogous to former employees' claim under Labor Management Relations Act for breach of collectively bargained pension plan, rather than two-year or four-year statutes of limitations applicable to various tort actions, and, thus, federal claims were not time barred under either applicable limitations period. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185; Ohio R.C. §§ 2305.09, 2305.10.

[7] Labor and Employment 231H \$\infty\$ 1320(1)

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1318 Actions for Breach
231Hk1320 Exhaustion of Internal

Remedies

231Hk1320(1) k. In General. Most

Cited Cases

(Formerly 232Ak416.1 Labor Relations)

Exhaustion of contractual grievance and arbitration procedures is prerequisite to action against employer by employee under Labor Management Relations Act for breach of labor contract; whether dispute must be arbitrated before judicial relief may be sought is determined by analyzing collective bargaining agreement to see if it permits or requires arbitration. Labor Management Relations Act,

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1947, § 301, 29 U.S.C.A. § 185.

[8] Labor and Employment 231H \$\infty\$ 1320(9)

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1318 Actions for Breach
231Hk1320 Exhaustion of Internal

Remedies

231Hk1320(9) k. Pensions and Other Benefits. Most Cited Cases

(Formerly 232Ak416.2 Labor Relations)

Collective bargaining agreement and pension plan did not permit or require grievance and arbitration of disputes arising under pension plan and, therefore, former employees' claims under Labor Management Relations Act for breach of collectively bargained pension plan would not be dismissed for failure to exhaust contractual remedies. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

[9] Estoppel 156 \$\infty\$=52(8)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52 Nature and Application of Estoppel in Pais

156k52(8) k. Particular Applications.

Most Cited Cases

Estoppel 156 € 119

156 Estoppel
156III Equitable Estoppel
156III(G) Trial
156k119 k. Questions for Jury. Most
Cited Cases

Equitable doctrines of estoppel and waiver are applicable to action under Labor Management Relations Act to enforce labor contract, and should be submitted to jury as involving questions of fact. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

[10] Estoppel 156 \$\infty\$=52.15

156 Estoppel

156III Equitable Estoppel 156III(A) Nature and Essentials in General 156k52.15 k. Essential Elements, Most

Cited Cases

Federal common-law elements of equitable doctrine of estoppel are that there has been conduct or language amounting to representation of material facts, that party to be estopped is aware of true facts, that party to be estopped intends that representation be acted on or acts such that party asserting estoppel has right to believe it so intended, that party asserting estoppel is unaware of true facts, and that party asserting estoppel detrimentally and justifiably relies on representation.

[11] Labor and Employment 231H \$\infty\$ 1319

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1318 Actions for Breach
231Hk1319 k. In General. Most Cited

Cases

(Formerly 232Ak777.1, 232Ak777 Labor Relaions)

Application of federal common-law doctrines of estoppel or waiver to employees' action under Labor Management Relations Act for violation of collectively bargained contract requires proof of more than mere fact that representation was made.

[12] Federal Courts 170B \$\infty\$955

170B Federal Courts

170BVIII Courts of Appeals

 ${\bf 170BVIII}(L) \ Determination \ and \ Disposition \ of \ Cause$

170Bk951 Powers, Duties and Proceedings of Lower Court After Remand

170Bk955 k. New Trial. Most Cited

Cases

District court's presentation of single issue of misrepresentation to jury, with respect to claims of

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former employees under the Labor Management Relations Act for violation of collectively bargained pension plan, improperly deprived employer of jury trial on all elements of waiver and estoppel, contrary to mandate of Court of Appeals; thus, remand was required. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

[13] Labor and Employment 231H \$\infty\$=695

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(K) Actions
231HVII(K)5 Actions to Recover Benefits
231Hk692 Evidence
231Hk695 k. Admissibility. Most

Cited Cases

(Formerly 296k141)

District court did not commit manifest abuse of its discretion in excluding certain evidence offered by employer on issues of estoppel and waiver in connection with former employees' claims against employer for breach of collectively bargained pension plan, in that evidence was not probative of whether alleged representations were made by employer; however, on remand district court might have to reconsider evidentiary rulings in light of jury's need to consider whether union or employees justifiably relied on representations. Fed.Rules Evid.Rules 401, 702, 28 U.S.C.A.; Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185

[14] Labor and Employment 231H \$\infty\$560

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(H) Coverage and Benefits of Particular Types of Plans
231Hk557 Pension and Retirement Plans
231Hk560 k. Necessity of Retirement;
Normal Retirement Age. Most Cited Cases
(Formerly 296k121)
Employees who no longer worked for employer

Employees who no longer worked for employer before age 55 were not "employees" when they reached age 55 for purposes of collectively bargained pension plan and, thus, could not "retire" on that date for purposes of plan, with respect to action by former employees under Labor Management Relations Act for breach of collectively bargained pension plan. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

[15] Labor and Employment 231H 🖘 722

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(K) Actions
231HVII(K)8 Costs and Attorney Fees
231Hk722 k, Review, Most Cited

Cases

(Formerly 296k143)

Motions for attorney fees of former employees, who brought action under Labor Management Relations Act for breach of collectively bargained pension plan, were not reviewable on appeal, not having been ruled on by district court. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185; 28 U.S.C.A. § 1291.

[16] Labor and Employment 231H 5717

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(K) Actions
231HVII(K)8 Costs and Attorney Fees
231Hk713 Particular Cases
231Hk717 k. Actions to Recover

Benefits. Most Cited Cases

(Formerly 296k143)

District court did not abuse its discretion in splitting, between employer and former employees, fees of special master employed in action under Labor Management Relations Act for breach of collectively bargained pension plan, rather than taxing all fees to employer, given lack of indication that employer acted fraudulently. Fed.Rules Civ.Proc.Rule 53(a), 28 U.S.C.A.; Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185

*1213 David S. Cupps (argued), Vorys, Sater, Sey-

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mour and Pease, Columbus, Ohio, Jonathan R. Vaughn, Thomas E. Bezanson, Audrey Kevy Wilner, Chadbourne, Parke, Whiteside, & Wolff, New York City, for defendant-appellant, cross-appellee.

Asher Bogin (argued), Dayton, Ohio, for plaintiffs-appellees, cross-appellants.

Before WELLFORD and MILBURN, Circuit Judges, and DeMASCIO, District Judge.

FN* Honorable Robert E. DeMascio, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

MILBURN, Circuit Judge.

Plaintiffs appeal and defendant cross-appeals from the district court's judgment for plaintiffs in this action to recover retirement benefits pursuant to a collectively-bargained pension plan. For the reasons that follow, we reverse in part and remand.

I. FACTS

A. Procedural Facts

Plaintiffs, former employees of Sunshine Biscuits, Inc. ("Sunshine") who had accumulated at least fifteen years of continuous service but were not fifty-five years of age in 1972 when Sunshine closed its Dayton, Ohio, bakery, brought this action on November 29, 1977, against defendant Sunshine seeking to recover early retirement benefits described in Sunshine's pension plan. Plaintiffs' amended complaint, filed December 16, 1977, alleged breach of contract, common law fraud, and securities fraud.

The district court dismissed the fraud claims, holding that the relevant statutes of limitations had run. Thereafter, the district court held that the pension plan granted early retirement benefits only to employees who had fifteen years of continuous service at Sunshine and were at least fifty-five years of age when they left Sunshine's employ. Because

each plaintiff was under fifty-five years of age when Sunshine's Dayton Bakery closed, the district court granted summary judgment for Sunshine on the contract claim thereby dismissing the case.

In a prior appeal, this court affirmed the district court's dismissal of the fraud claims, but reversed the district court's grant of summary judgment on the breach of contract claim. Apponi v. Sunshine Biscuits, Inc., 652 F.2d 643, 649-50 (6th Cir.1981) ("Apponi I"). This court, although declining to rule on the proper interpretation of the pension plan, determined that representations regarding plaintiffs' rights to retirement benefits allegedly made by Sunshine's negotiators during negotiations concerning the pension plan gave rise to "triable issues of fact" under the equitable doctrines of estoppel and waiver. 652 F.2d at 649-50. The court reversed and remanded "for a jury trial as to whether the company made the representations alleged." 652 F.2d at 650-51.

On remand, the district court excluded all evidence not relevant to whether the representations were made and submitted a single*1214 factual issue to the jury for its determination: "Do you find that agents of [Sunshine] advised representatives of [plaintiffs' union] that an employee with 15 years of service would receive a pension at age fifty-five whether the Dayton Bakery was open or not?" The jury found that Sunshine's agents had made the representations.

The district court then referred the matter to a special master for determination of the amount due each plaintiff. Plaintiffs and defendant stipulated that any pension benefits found to be due would be paid as lump sums. The district court adopted the first report of the special master which calculated a monthly pension benefit for each plaintiff, and plaintiffs and Sunshine appealed. This court dismissed the appeals and remanded for a "final decision on the issue of lump sum damage awards." On remand, the district court again referred the action to the special master. The district court then adopted the second report of the special master

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which determined the lump sum awards and ordered Sunshine to pay \$3,032,158.43 into the court.

B. Historical Facts

Prior to 1968, Sunshine established an employer-funded pension plan applicable to hourly employees at all of Sunshine's facilities in the United States. For employees who qualified, the pension plan provided full benefits upon retirement at or after age sixty-five, lesser benefits on early retirement at or after age fifty-five, and minimum benefits for retirement caused by disability at or after age forty-five.

In 1968, representatives of plaintiffs' union, Bakery and Confectionary Workers' International Union of America, Local 310 ("Local 310"), in the course of negotiating a two-year collective bargaining agreement with Sunshine, sought vesting of benefits on the basis of years of service only. Local 310's list of proposals included:

Pension: The members will receive the following: job vesting regardless of age, for example: a man with twenty-five years of service, age 42, can leave the industry (bakery) forever and at age 55 receive a reduced pension the rest of his life (without ever returning to work).

For example: a man with fifteen years of service at age 32 or more may leave the industry (bakery) forever and receive a reduced pension at age 55 (without ever returning to work).

Witnesses for plaintiffs stated in affidavits and testified at the trial that Sunshine's negotiators' response to the proposal was that the pension plan, as it stood in 1968, provided for vesting of benefits after fifteen years of continuous service.

In the 1970 collective bargaining negotiations, Local 310 again sought vesting of pension benefits on the basis of years of service only. The union's list of proposals included a proposal and an example which were identical to that made in 1968 as quoted above. Witnesses for plaintiffs stated in affidavits and testified at the trial that Sunshine's negotiators again responded that the pension plan, as it stood in 1970, provided for vesting of benefits after fifteen years of continuous service.

Neither the 1968 negotiations nor the 1970 negotiations resulted in any change in the collective bargaining agreement or the pension plan concerning vesting of pension benefits. The key provision of the pension plan involved is paragraph 23, which provides: "An employee will be eligible to retire early, provided he is at least 55 years of age and has completed 15 or more years of continuous service."

In June 1972, Sunshine closed the Dayton Bakery because it could not comply with the Food and Drug Administration's requirements. Each union member was notified that the plant was closing and was informed of individual exit interviews at the plant. At those exit interviews, Sunshine gave each departing employee a sheet specifying the amount of pension benefits to which each employee was entitled. The exit interview forms for employees under age fifty-five showed no presently payable pension benefits.

*1215 II. SUNSHINE'S CROSS-APPEAL

A. Pre-emption

[1] Sunshine argues that because plaintiffs' action arises out of Sunshine's purported obligations under a collectively-bargained pension plan or directly out of the collective bargaining process itself, it necessarily arises under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. This argument was not raised in Sunshine's answer nor presented to the prior panel. Ordinarily, "a failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case." 5 C. Wright & A. Miller, Federal Practice and Procedure § 1278, at 339 (1969). Section 301, however, expresses a compelling policy in favor of uniform application of federal law in actions to enforce labor contracts, and, therefore, we decline to apply the waiver rule. See National Metalcrafters v. McNeil, 784 F.2d 817, 825-26 (7th Cir.1986).

[2][3] Section 301 provides that the federal courts have jurisdiction in "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ..., or between any such labor organizations." 29 U.S.C. § 185(a). Section 301 not only confers on federal courts jurisdiction in actions involving enforcement of labor contracts but also authorizes the federal courts to fashion the substantive law to be applied in suits under section 301. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456, 77 S.Ct. 912, 917, 1 L.Ed.2d 972 (1957). In fashioning federal substantive law, federal courts may resort to state law if it is compatible with federal labor policy. Id. at 457, 77 S.Ct. at 918. However, inconsistent state law must give way to principles of federal labor law. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 102, 82 S.Ct. 571, 576, 7 L.Ed.2d 593 (1962).

[4] The scope of the pre-emptive effect of section 301 was recently clarified by the Supreme Court in Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). There, an employee brought an action against his employer, who was responsible for administering a nonoccupational disability insurance plan under the collective bargaining agreement, alleging bad faith in the handling of his claim. The Court held that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, ... or dismissed as pre-empted by federal labor-contract law." Id. at 1916 (citation omitted). The Court reasoned:

If the policies that animate § 301 are to be given their proper range, however, the pre-emptive effect of § 301 must extend beyond suits alleging contract violations. These policies require that "the relationships created by [a collective-bargaining] agreement" be defined by an application of "an evolving federal common law grounded in national labor policy." ... Thus, questions relating

to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.

Id. at 1911 (quoting *Bowen v. United States Postal Service*, 459 U.S. 212, 224-25, 103 S.Ct. 588, 595-96, 74 L.Ed.2d 402 (1983)).

The term "contracts," as used in section 301, is not limited to collective bargaining agreements but includes other agreements between employers and labor organizations. Retail Clerks International Association, Local Union Nos. 128 and 633 v. Lion Dry Goods, Inc., 369 U.S. 17, 26-28, 82 S.Ct. 541, 547-48, 7 L.Ed.2d 503 (1962); Whelan v. Colgan, 602 F.2d 1060, 1061 (2d Cir.1979). Collectively-bargained pension plans are "contracts" for the purposes of section 301. Rehmar v. Smith, 555 F.2d 1362, 1367 (9th Cir.1977); see also *1216International Union, UAW v. Textron, Inc., 312 F.2d 688, 690-91 (6th Cir.1963). Here, plaintiffs' claims arise from Sunshine's purported obligations under the collectively-bargained pension plan. Therefore, the holding in Allis-Chalmers requires that plaintiffs' claims be treated as section 301 claims.

B. Statute of Limitations

Sunshine argues that plaintiffs' claims under section 301 are barred by the six-month statute of limitations established by the Supreme Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). It is the law of the case that plaintiffs' cause of action against Sunshine accrued "not later than 1972 when the company shut down its Dayton Bakery." *Apponi I*, 652 F.2d at 650 n. 10. Thus, if the six-month statute of limitations is applicable here, plaintiffs' claim, filed in 1977, is time-barred.

[5] However, in *DelCostello* the Court held that the six-month statute of limitations period of section 10(b) of the National Labor Relations Act, 29

U.S.C. § 160(b), is applicable to hybrid section 301/fair representation actions. The Court limited its holding to the so-called hybrid action against both employer and union, distinguishing rather than overruling International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966), which applied the state limitations period for breach of contract actions to an action by a union alleging a breach of the collective bargaining agreement. Thus, federal courts may still resort to the most analogous state statute of limitations where, as here, the action does not implicate the breach of the union's duty of fair representation. Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc., 799 F.2d 1098, 1107 (6th Cir.1986) (en banc).

[6] Sunshine argues that the most analogous Ohio statute of limitations is either the two-year period applicable in actions alleging bodily injury or injury to personal property, Ohio Rev.Code § 2305.10, or the four-year period applicable to other tort actions, Ohio Rev.Code § 2305.09. However, plaintiffs' claims against Sunshine for breach of the collectively-bargained pension plan sound in contract rather than in tort. See Kraftco, 799 F.2d at 1106. Ohio law provides a six-year statute of limitations for actions alleging breach of an oral contract, Ohio Rev.Code § 2305.07, and a fifteen-year statute of limitations for actions alleging breach of a written contract, Ohio Rev.Code § 2305.06. We hold that under either statute, plaintiffs' claims are not time-barred.

C. Exhaustion

[7] Sunshine argues that plaintiffs' claims must be dismissed because they failed to exhaust the grievance and arbitration procedures contained in the collective bargaining agreement. Exhaustion of contractual grievance and arbitration procedures is a prerequisite to a section 301 action by an employee against the employer for breach of a labor contract. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53, 85 S.Ct. 614, 616, 13 L.Ed.2d 580 (1965). Whether a dispute must be arbitrated before

judicial relief may be sought is determined by analyzing the collective bargaining agreement to see if it permits or requires arbitration. *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 104 S.Ct. 1844, 1849, 80 L.Ed.2d 366 (1984).

[8] The 1968 and 1970 collective bargaining agreements between Local 310 and Sunshine provided a grievance and arbitration procedure to handle "any controversy or difference ... aris[ing] between the company and the union with respect to interpretation or effect" of the collective bargaining agreement. The collectively-bargained pension plan did not provide for grievance and arbitration of disputes arising under it, but vested in an administrative committee, to be appointed by Sunshine's board of directors, exclusive authority to determine questions arising in administration and interpretation of the plan. The collective bargaining agreement did *1217 not contain any provisions for pension benefits nor incorporate the pension plan by reference. Because the collective bargaining agreement and pension plan did not permit or require grievance and arbitration of disputes arising under the pension plan, plaintiffs' claims should not be dismissed for failure to exhaust contractual remedies. See RCA Corp. v. Local 241, International Federation of Professional and Technical Engineers, 700 F.2d 921, 927 (3d Cir.1983).

D. Waiver and Estoppel

[9] Sunshine argues that the district court's presentation of the single factual issue to the jury violated this court's mandate in *Apponi I* and improperly deprived it of a full trial on the issues of waiver and estoppel. The equitable doctrines of estoppel and waiver are applicable in a section 301 action to enforce a labor contract. *See Beer, Soft Drink, Water, Fruit Juice, Carbonic Gas, Liquor Sales Drivers, Local Union No. 744 v. Metropolitan Distributors, Inc.*, 763 F.2d 300, 304 (7th Cir.1985); *Hass v. Darigold Dairy Products*, 751 F.2d 1096, 1099 (9th Cir.1985). Further, estoppel and waiver involve questions of fact which should be submitted to the jury. *See Ouimette v. E.F. Hutton & Co.*, 740

F.2d 72, 76 (1st Cir.1984); *United States v. Commercial Mechanical Contractors, Inc.*, 707 F.2d 1124, 1128 (10th Cir.1982).

[10][11] The elements constituting estoppel, as defined by federal common law, are: (1) conduct or language amounting to a representation of material facts; (2) the party to be estopped must be aware of the true facts; (3) the party to be estopped must intend that the representation be acted on or act such that the party asserting the estoppel has a right to believe it so intended; (4) the party asserting the estoppel must be unaware of the true facts; and (5) the party asserting the estoppel must detrimentally and justifiably rely on the representation. Acri v. International Association of Machinists, 781 F.2d 1393, 1398 (9th Cir.1986); see also Hass, 751 F.2d at 1099-1100. Waiver, as defined by federal common law, requires an "intentional relinquishment of a known right." Larkins v. NLRB, 596 F.2d 240, 247 (7th Cir.1979). Under either doctrine, imposition of liability requires proof of more than the mere fact that a representation was made. Acri, 781 F.2d at 1398; Larkins, 596 F.2d at 247.

[12] The district court erroneously concluded that this court's mandate in *Apponi I*, remanding for "a jury trial as to whether the company made the representations alleged," precluded the jury's consideration of all other elements of waiver and estoppel. It has long been recognized that in determining the intent of the mandate, it is appropriate to look to the entire opinion of the court of appeals. *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 n. 2 (11th Cir.1984) (per curiam). This court, in its prior opinion, stated:

We think that the allegations made in [plaintiffs'] affidavits present triable issues of fact. We rely on two related doctrines, waiver and estoppel. It is well settled that a party may voluntarily relinquish a known right through words or by conduct.... It is similarly settled that a party whose conduct misleads another is barred, or estopped from asserting legal rights that it otherwise could assert.... If company representatives

did make the statements they were alleged to have made during the labor negotiations, then the company shall be precluded from arguing that it is not liable.

652 F.2d at 649-50 (citations and footnotes omitted). Further, this court stated in a footnote to the opinion that "issues as to waiver or estoppel are classic examples of disputed questions of fact which are amenable to decision by a jury." 652 F.2d at 651 n. 12.

Although not free from ambiguity, this court's opinion in *Apponi I* contemplated a jury trial on all the elements of waiver and estoppel. The district court's failure to follow this court's mandate requires that this case be remanded for a jury trial on those elements of waiver and estoppel not submitted to the jury in the prior proceeding.*1218 *See In re United States Steel Corp.*, 479 F.2d 489, 493-94 (6th Cir.), *cert. denied*, 414 U.S. 859, 94 S.Ct. 71, 38 L.Ed.2d 110 (1973).

Sunshine argues that the jury's finding that Sunshine's negotiators made the representations alleged must be set aside because the district court erroneously excluded evidence offered to prove that Sunshine's negotiators did not make the representations. Specifically, Sunshine challenges the district court's exclusion of the following evidence: (1) a 1974 letter from Joseph G. Kane, Executive Vice-President of the Bakery and Confectionary Workers International Union, to Charles Vest, a named plaintiff, stating that Vest was not entitled to pension benefits because he left Sunshine's employ prior to his fifty-fifth birthday; (2) Kay Apponi's statement that she was told by her attorney in 1972 or 1973 that her case lacked merit; (3) testimony of James K. Lawrence, a purported expert in labor relations, that plaintiffs did not exhaust available grievance and arbitration procedures, that the pension plan provided early retirement benefits only to those employees who attained age fifty-five while in Sunshine's employ, and that it was unlikely that any oral agreement between Local 310 and Sunshine would not have been integrated into the

agreement; and (4) exit interview forms indicating that plaintiffs were not presently entitled to pension benefits. The district court found this evidence irrelevant and of no probative value. We agree.

Under the Federal Rules of Evidence, the district court has broad discretion in determining the relevancy and admissibility of evidence. See United States v. Blanton, 700 F.2d 298, 313 (6th Cir.), adopted on reh'g, 719 F.2d 815, 833 (6th Cir.1983), cert. denied, 465 U.S. 1099, 104 S.Ct. 1592, 80 L.Ed.2d 125 (1984); United States v. Phillips, 575 F.2d 97, 100 (6th Cir.1978); United States v. Jenkins, 525 F.2d 819, 824 (6th Cir.1975) (per curiam). A district court's ruling on evidentiary matters will be reversed only on a clear showing of abuse of discretion. Blanton, 700 F.2d at 313; Jenkins, 525 F.2d at 824. Similarly, the determination whether to admit expert testimony is committed to the sound discretion of the district court. See United States v. Green, 548 F.2d 1261, 1268 (6th Cir.1977). The district court's decision to exclude expert testimony will be sustained "unless manifestly erroneous." Id. (quoting Spring Co. v. Edgar, 99 U.S. (9 Otto) 645, 658, 25 L.Ed. 487 (1878)).

[13] Evidence may be excluded as irrelevant if it is not probative of the proposition it is offered to prove. Fed.R.Evid. 401; see also 22 C. Wright & K. Graham, Federal Practice and Procedure § 5165 (1978). The Kane letter is not probative of whether the alleged representations were made because Kane was not present during the negotiations, and there is no evidence that he knew what transpired. The exit interview forms are not probative of whether the alleged representations were made because they showed only that no retirement benefits were due plaintiffs when the bakery closed and did not in any way foreclose the possibility of retirement benefits accruing at a later date. Kay Apponi's statement with regard to what she was told by her attorney is obviously not probative of whether the alleged representations were made.

Under Rule 702 of the Federal Rules of Evidence, expert testimony may be admitted if it "will

assist the trier of fact to understand the evidence or to determine a fact in issue." Here, the legal conclusions of Sunshine's purported expert would not have assisted the jury's understanding of the evidence or their determination whether the representations were made. Moreover, "[i]t is not for witnesses to instruct the jury as to applicable principles of law, but for the judge." *Marx & Co. v. Diners Club, Inc.*, 550 F.2d 505, 509-10 (2d Cir.), *cert. denied*, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977). Thus, the district court's exclusion of the evidence offered was not an abuse of discretion or manifestly erroneous, and the jury's finding that the representations were made will not be disturbed.

*1219 Although the evidence excluded was not probative of whether Sunshine's negotiators made the representations alleged, it may be probative of whether there was justifiable and detrimental reliance on the part of the Union and/or the plaintiffs. On remand the jury must consider whether the representations were made by one with authority to bind Sunshine, whether the representations were assertions of opinion or of material fact, and whether the representations were intended by the speaker to be acted upon by the plaintiffs or induce them to take action which they otherwise would not have taken. The district court may need to reconsider these evidentiary rulings in light of the remand for the purpose of determining whether all the requirements of equitable estoppel have been satisfied in the case.

E. Special Master's Report

Sunshine argues that the district court improperly referred the question of damages to the special master and erroneously adopted the special master's recommendation. Our decision reversing the district court's imposition of liability requires us to vacate the award of damages. Thus, review of the special master's report is unnecessary.

III. PLAINTIFFS' APPEAL

A. Interpretation of the Pension Plan

[14] Plaintiffs argue that this court should con-

strue the pension plan to confer early retirement benefits upon those employees with fifteen years of service regardless of whether they were employed at the bakery at age fifty-five. Paragraph 23 provides that "[a]n employee will be eligible to retire early, provided he is at least 55 years of age and has completed 15 or more years of continuous service." "Employee" means "one employed by another ... for wages." Webster's New International Dictionary 742 (3d ed. 1981). "Retire" means "to withdraw from office, public station, business occupation, or active duty." Id. at 1939; see also Black's Law Dictionary 1183 (5th ed. 1979) ("retire" means "[t]o terminate employment or service upon reaching retirement age."). Those individuals who left Sunshine's employ before age fifty-five were not "employees" when they reached age fifty-five and thus could not "retire" on that date. Thus, paragraph 23 is not ambiguous, and no construction is necessary. See Serrano v. Jones & Laughlin Steel Co., 790 F.2d 1279, 1288-89 (6th Cir.1986); Local 783, Allied Industrial Workers v. General Electric Co., 471 F.2d 751, 757 (6th Cir.), cert. denied, 414 U.S. 822, 94 S.Ct. 120, 38 L.Ed.2d 55 (1973).

Moreover, plaintiffs' proposed construction would require enlargement of the class of plaintiffs beyond that certified by the district court. The district court certified a class composed of "all former employees of [Sunshine] employed at the Dayton plant thereof who prior to April 30, 1972, had completed 15 years of continuous service and had not by April 30, 1972 attained the age of 55 years." In *Apponi I*, this court stated that "[t]he plaintiff class members are former Sunshine employees who accumulated 15 or more years service with the company before losing their jobs in 1972 when Sunshine shut down its Dayton Bakery." 652 F.2d at 646. Persons who left Sunshine prior to closing of the bakery are not members of the class.

FN1. Plaintiffs also argue that this court should construe the pension plan to confer early retirement benefits upon all former employees with fifteen years' service

"regardless of whether they were members of [Local 310] to which the estoppel related." Having concluded that paragraph 23 confers early retirement benefits only upon those employees who were working at Sunshine at age fifty-five, we must also conclude that those employees who were not working at Sunshine at age fifty-five and who were not members of Local 310 are not entitled to early retirement benefits.

B. Attorneys' Fees

[15] Plaintiffs argue that the district court should have granted their motions to tax their attorneys' fees against Sunshine and compel discovery of Sunshine's attorneys' fees. An appellate court has jurisdiction*1220 to entertain appeals only from final orders. See 28 U.S.C. § 1291. Attorney fee issues are subject to the "ordinary principles of finality." 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3915, at 270 (Supp.1986); see also Fort v. Roadway Express, Inc., 746 F.2d 744, 747 (11th Cir.1984). Plaintiffs' motions regarding attorneys' fees, having not been ruled on by the district court, are not currently reviewable by this court.

C. Special Master's Fees

[16] Plaintiffs argue that the fees of the special master should have been taxed to defendant rather than split between the parties because the proceedings before the special master were necessitated by Sunshine's fraudulent denial of its obligations under the pension plan and because plaintiffs prevailed. Under Rule 53(a) of the Federal Rules of Civil Procedure, the district court may charge the special master's compensation against one or more of the parties or apportion it among them. See Morgan v. Kerrigan, 530 F.2d 401, 427 (1st Cir.), cert. denied, 426 U.S. 935, 96 S.Ct. 2648, 49 L.Ed.2d 386 (1976); Erickson's, Inc. v. Travelers Indemnity Co., 454 F.2d 884, 885 (5th Cir.), cert. denied, 409 U.S. 847, 93 S.Ct. 51, 34 L.Ed.2d 87 (1972). The district court has broad discretion to determine which of the parties to charge, and the district court's de-

(Cite as: 809 F.2d 1210)

cision will not be disturbed absent an abuse of that discretion. *Morgan*, 530 F.2d at 427.

Contrary to plaintiffs' argument, the record does not contain any indication that Sunshine has acted fraudulently. Plaintiffs' fraud claims were dismissed shortly after this action was filed. Further, assessment of a portion of the special master's fees against the prevailing party does not constitute a per se abuse of discretion. See *Dyker Building Co. v. United States*, 182 F.2d 85, 89 (D.C.Cir.1950). Plaintiffs have not shown any basis for concluding that the district court abused its discretion, and the taxing of the special master's fees by the district court is affirmed.

IV.

For the reasons stated above, we REVERSE in part and REMAND to the district court for a jury trial on those elements of waiver and estoppel not previously submitted to the jury. However, having concluded that the jury's determination that Sunshine's negotiators made the representations alleged is free from error, that determination is binding upon the parties. On remand, the district court shall instruct the jury that the representations were made.

C.A.6 (Ohio),1987.

Apponi v. Sunshine Biscuits, Inc.

809 F.2d 1210, 124 L.R.R.M. (BNA) 2494, 55

USLW 2455, 106 Lab.Cas. P 12,361, 7

Fed.R.Serv.3d 565, 8 Employee Benefits Cas. 1397, 22 Fed. R. Evid. Serv. 561

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

GENE R. EATINGER, on behalf of himself and all similarly situated royalty owners,)
Plaintiffs,)) Case No. 07-1266-EFM-KMH
v.)
BP AMERICA PRODUCTION COMPANY,)
Defendant.)
)

STIPULATION REGARDING NOVEMBER 3, 2011 NOTICE OF VIDEOTAPED RULE 30(b)(6) DEPOSITION OF BP AMERICA PRODUCTION COMPANY WITH SUBPOENA DUCES TECUM

The parties have reached the following stipulations in lieu of Plaintiff's November 3, 2011 Rule 30(b)(6) Notice with respect to Item Nos. 2, 5, and 8. Plaintiff hereby withdraws that Notice with respect to those Items and the parties enter into the stipulations set forth below.

STIPULATIONS OF THE PARTIES

The Plaintiffs' Deposition Topic No. 2

The gas analysis showing what is tested, measured, reported, and recorded at each location and how from the well-head to the Southern Star transmission line including without limitation (a) any testing for water vapor or gaseous water content or water saturation that is done or not done, and if not done, why it is not done; (b) sampling and analysis at the wellhead of each Class Well; (c) sampling and analysis on gas between the wellhead of each Class Well and the mechanical separator or drip system on the lease; (d) sampling and analysis on gas before the gathering line inlet; (e) sampling and analysis on gas at the gathering line inlet {or meter run); (f) sampling and analysis on gas after the gathering line inlet (or meter run) and the inlet to the Jayhawk Plant; (g) sampling and analysis on gas at the inlet to the Jayhawk Plant; (h) sampling and analysis on gas within the Jayhawk Plant but before recompression to enter the Southern Star transmission line; (i) sampling and analysis on gas at the recompressor at the tailgate of the Jayhawk Plant; (j) sampling and analysis on gas at the inlet to the Southern Star transmission line. Also included in this Topic are identification, production (or lack thereof) in discovery, location or where found in BP's records or bates number(s) if produced, and explanation of all documents (a) used to educate the witness(es) on this Topic; or (b) that show such gas analysis or water vapor testing at each location in any month chosen by BP in 2010 or 2011.

Stipulation Regarding The Plaintiffs' Deposition Topic No. 2

BP stipulates that no water vapor or gaseous water content testing is performed between the wellhead and the inlet to the Jayhawk Plant. BP does analyze the gas for other reasons but also stipulates that it does not conduct or have conducted gas sampling for gas analysis or testing at (a) at the wellhead of any Class Well; (b) between the wellhead of any Class Well and the mechanical separator or drip system on the lease; or, (c) before the gathering line inlet—but does sample and analyze gas for each Class Well at the gathering line inlet meter run, an example of which is at BPAPC-E0043803. Gas sampling and gas analysis is next performed at the inlet to the Jayhawk Plant, an example of which is at BPAPC-E0043802. Finally, gas sampling and gas analysis is next done after recompression of the residue gas at the inlet to the Southern Star interstate pipeline, but BP does not keep records reflecting the results.

The Plaintiffs' Deposition Topic No. 5

Removal of drip condensate that occurs from the wellhead of each Class Well through the Southern Star transmission line including without limitation (a) at the wellhead of each Class Well; (b) between the wellhead of each Class Well and the mechanical separator or drip system on the lease; (c) before the gathering line inlet; (d) at the gathering line inlet (or meter run); (e) after the gathering line inlet (or meter run) and the inlet to the Jayhawk Plant; (f) at the inlet to the Jayhawk Plant; (g) within the Jayhawk Plant but before recompression to enter the Southern Star transmission line; (h) at the recompressor at the tailgate of the Jayhawk Plant; (i) at or near the slug catcher associated with the Jayhawk Plant, (j) at the inlet to the Southern Star transmission line, (k) at any other location prior to the Southern Star transmission line. Also included in this Topic are identification, production (or lack thereof) in discovery, location or where found in BP's records or bates number(s) if produced, and explanation of all documents (a) used to educate the witness(es) on this Topic; (b) that show such removal of drip condensate at each location for each month from August 2003 -present; and (c) showing the volume, price, and value of sales of such drip condensate from each location for each month from August 2003-present.

Stipulation Regarding The Plaintiffs' Deposition Topic No. 5

Drip condensate or condensate attributable to class wells is removed only at the following locations: (1) at a mechanical separator or drip system on the lease prior to any gathering-line inlet, (2) on the gathering lines, (3) at the slug catcher associated with the Jayhawk Plant, and (4) at or near compressors on the gathering lines.

At times during the class period, Regency, which owns the gathering lines, has sold condensate. BP has produced the following documents reflecting such sales: BPAPC – E023968 and E0023884. In its response to Interrogatory No. 3 to Plaintiff's First Set of Interrogatories on the Merits, BP has agreed to search its records for additional documents reflecting such sales.

The Plaintiffs' Deposition Topic No. 8

Any changes in the royalty calculation methodology during the Class Period as to Class gas from the methodology described in the deposition of Don Saxton taken in this case, irrespective of whether such difference is as to production from Class Wells connected to the AB or C gathering systems or to some other gathering line that has carried production from Class Wells to the Jayhawk Plant.

Stipulation Regarding The Plaintiffs' Deposition Topic No. 8

BP stipulates that the methodology used to compute royalties paid to class members related to class wells has remained unchanged during the class period, as referenced in the depositions of Don Saxton taken on February 19, 2009 and September 21, 2009, except for the following changes:

- (1) Beginning with production for July 2010, BP began paying royalties on nitrogen for its gas, which it computes for each class well by taking the total amount paid by Praxair for nitrogen during the month and multiplying that amount by a fraction in which the numerator is the total volume of nitrogen from that particular well using the volume and gas analysis readings used elsewhere in the royalty calculations and the dominator is the total theoretical nitrogen volume from all class wells as determined by the same volume and gas analysis readings. BP advises that efforts are underway to process prior-period adjustments to pay royalties on nitrogen from August 2004 through June 2010 production without interest.
- (2) Beginning with production for July 2009, BP made changes in the royalty valuation formulas such that royalty owners were not charged the half-a cent per gallon marketing fee on all of BP's NGLs attributable to class wells. This change did not properly occur for NGLs related to the C side, Grant and Regency inlets. Effective with production for March, 2010, the change was implemented for the C side, Grant and Regency inlets.
- (3) Sometime prior to August 2004, production from some class wells that had previously been processed elsewhere began to be processed at the Jayhawk Plant through the Grant Gathering Line and the Grant Gathering Line Inlet to the plant, and the NGL and helium royalty calculations used the same methodology reflected in Mr. Saxton's deposition testimony with BP's share of such production entering through the Grant Gathering Inlet being 100%.

- (4) Beginning in October 2004, production from some class wells that had previously been processed elsewhere began to be processed at the Jayhawk Plant and arrived at the Plant through the Inlet that was once known as the CIG Inlet and is now called the Regency Inlet. The NGL and helium calculations for such wells used the same methodology stated in Mr. Saxton's deposition testimony.
- (5) Under the terms of the Youngren settlement, beginning in August 2004, BP deducted only 25% of the gathering charges in the calculation of royalties payable to class members. Beginning in August 2009 to the present, BP's policy has been not to deduct any gathering charges in the calculation of royalties payable to class members. There are a small number of royalty payees where this change did not properly occur. BP represents that efforts are underway to process prior-period adjustments to pay royalties on these gathering charges from August 2004 through the present. Gathering charge claims are not in this case.
- (6) While Mr. Saxon testified at page 132 of his deposition transcript that severance tax is not deducted for helium, BP's records indicate that both severance tax and conservation fees for both helium and nitrogen are deducted.
- On pages 183-189 of his deposition transcript, Mr. Saxon discusses pure propane allocation. Beginning with production for March 2010, there was not a separate allocation for pure propane at the Jayhawk Plant in the royalty calculation; instead, the pure propane volume sold at the Plant are added to the other propane in the royalty calculation to give a total monthly propane volume.
- (8) On pages 199-211 of his deposition transcript, Mr. Saxon discusses the weighted average price for NGLs used in royalty calculations. Beginning with production for March 2010,

the royalty calculation is based on a volume of each component (e.g. ethane, propane, iso-butane, normal butane, and hexane+) that is valued separately at OPIS minus T & F.

(9) On pages 179-182 of his deposition transcript, Mr. Saxon discusses the allocation of theoretical gallons of NGLs for royalty purposes. Beginning with production for March 2010, allocations for BP's royalties are based on the actual/recovered gallons for that month.

Gathering deductions on class members' gas traveling to the Jayhawk Plant via the Gran:

Gathering Inlet and via the Regency Inlet (formerly known as the CIG Inlet) were handled exactly like those deductions for production that entered the Jayhawk Plant via the WFS A&B

System Inlet and WFS C System Inlet.

Dated: January 31, 2012

Respectfully submitted,

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